SUPREME COURT OF THE UNITED STATES.

No. 456.

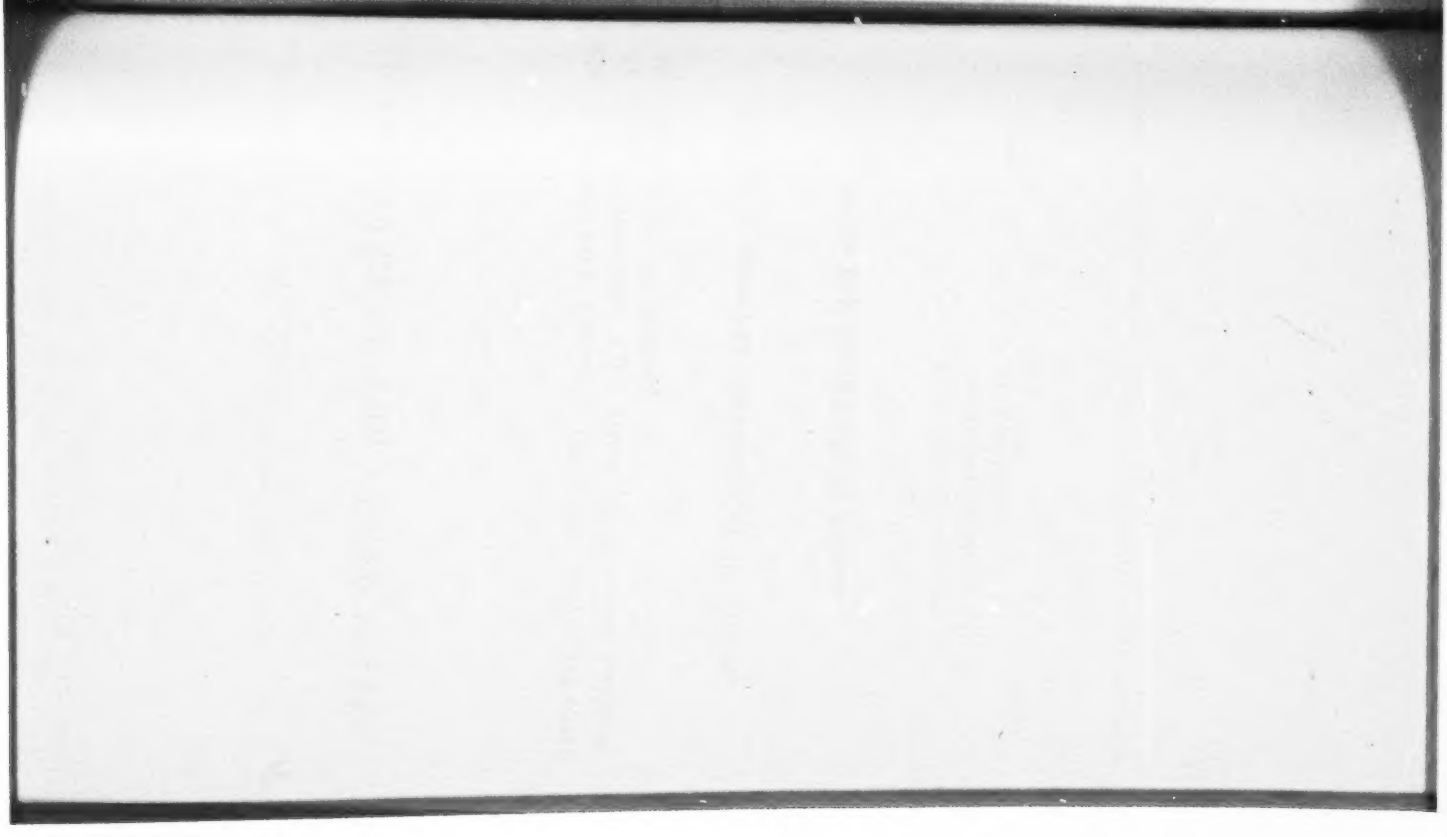
ELIAS S. A. DE LIMA, ELIAS A. DE LIMA, AND EDWARD DE LIMA, COMPOSING THE FIRM OF D. A. DE LIMA & CO., PLAINTIFFS IN ERROR,

vs.

GEORGE R. BIDWELL, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

FREDERIC R. COUDERT, JR.,
CHARLES FREDERICK ADAMS,
PAUL FULLER,
Of Counsel.



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STATEMENT OF THE CASE.

Brought up by writ of error to the circuit court of the United States for the southern district of New York, in the second circuit, this case raises the question whether the said court *erred* in sustaining the demurrer interposed by the defendant, George R. Bidwell (collector of customs at the port of New York), to the complaint herein, and dismissing the said complaint.

The questions of law involved are:

First, whether the said circuit court "*had jurisdiction* of the cause of action alleged in the complaint against the defendant."

Second, whether "the complaint states facts sufficient to constitute a cause of action against the defendant."

The questions are raised under the following circumstances:

"On or about the 6th day of November, 1899, the defendant" (being at the time "the duly appointed and commissioned collector of customs of the United States at the port of New York, in the actual and unrestricted exercise of his functions as such collector, and fully vested with all the powers and authority of his said office") "did under color of his said office and through the * * * exercise of the powers and authority in him vested for the purposes of the performance of his duties as such collector, * * * demand and by duress of goods collect from the plaintiffs' said firm of D. A. De Lima & Co., as alleged duties upon certain sugars, the product of the island of Puerto Rico, consigned to (said) plaintiffs at the port of New York, and brought thither from the port of San Juan in the said island during the month of July, 1899, by steamer *Salamanca* (the said sugars being those mentioned and described in warehouse entry No. 117,587, bond No. 1224, liquidated Sept. 11, 1899), the sum of two thousand four hundred and fifty dollars and fifty-eight cents ($2,450.58), which sum the plaintiffs were * * * against their will and in spite of their formal protest duly made compelled to pay, and did pay, in order to obtain possession of the said sugars, * * * which the said defendant, enabled so to do by the power and authority of his said office, had detained, was detaining, and threatened

to continue to detain from them, exacting as a condition to the delivery thereof such payment of said alleged duties. * * *

"* * * On or about the 14th day of September, 1899, the defendant, being such collector as aforesaid, did, under color of his said office, and through the * * * exercise of the powers and authority in him vested for the purposes of the performance of his duties as such collector, * * * demand and by duress of goods collect from the plaintiffs' said firm of D. A. De Lima & Co., as alleged duties upon certain sugars, the product of the island of Puerto Rico, consigned to the plaintiffs at the port of New York, and brought thither from the port of San Juan in the said island during the month of June, 1899, by steamer *Evelyn* (the said sugars being those mentioned and described in consumption entry No. 95684, liquidated Sept. 11, 1899), the sum of five thousand four hundred and fifty-two dollars and sixty-one cents ($5,452.61), which sum (the) plaintiffs were * * * against their will and in spite of their formal protest duly made compelled to pay, and did pay, in order to obtain possession of said sugars, * * * which the said defendant, enabled so to do by the power and authority of his said office, had detained, was detaining, and threatened to continue to detain from them, exacting as a condition to the delivery thereof such payment of such alleged duties. * * *

"* * * On or about the 1st day of September, 1899, the defendant being such collector as aforesaid, did; under color of his said office and through the * * * exercise of the powers and authority in him vested for the purpose of the performance of his duties as such collector * * * demand and by duress of goods collect from the plaintiffs' said firm of D. A. de Lima & Co., as alleged duties upon certain sugars, the product of the island of Puerto Rico, consigned to (the) plaintiffs at the port of New York, and brought thither from the port of San Juan, in the said island, during the month of , 1899, by steamer *Catania* (the said sugars being those mentioned and described in consumption entry No. 89319, liquidated September 1st, 1899, the sum of five thousand two hundred and forty-two dollars and seventeen cents ($5,242.17), which sum (the) plaintiffs were * * * against their will and in spite of their formal protest duly made, compelled to pay, and did pay, in order to obtain possession of their said sugars, * * * which the said defendant, enabled so to do by the power and authority of his said office, had detained, was detaining, and threatened to continue to detain from them, exacting as a condition to the delivery thereof, such payment of such alleged duties. * * *" (*Facts stated in the complaint and admitted by demurrer, Record*, pp. 3, 4, and 5).

Having thus, under protest, paid the said alleged duties exacted from them as a condition to the delivery to them of the sugars in question, the plaintiffs in error brought this suit to recover back the same, in the supreme court of the State of New York.

(*See summons and complaint in the State court, Record*, pp. 3, 4, and 5.)

By writ of *certiorari*, dated March 22nd, 1900, and sued out by the defendant Bidwell, through Henry L. Burnett, esq., U. S. attorney,

acting as attorney for said defendant, the said suit was *removed* into the said circuit court of the United States for the southern district of New York, in the second circuit.

(*Writ of certiorari*, *Record*, p. 7.)

Thereupon the said U. S. attorney, acting as attorney for said defendant, interposed a *demurrer* to the complaint upon the following grounds:

"*First*. Upon the ground that it does not state facts sufficient to constitute a cause of action against the defendant.

"*Second*. Upon the ground that this court has no jurisdiction of the cause of action alleged in said complaint against said defendant."

(*See demurrer*, *Record*, pp. 7 and 8, folio 12.)

By its *decree*, filed October 17th, 1900, the said circuit court

"ordered, adjudged, and decreed that the said demurrer * * * be *sustained*, both on the ground that the complaint does not state facts sufficient to constitute a cause of action against the defendant, and on the further ground that this court has no jurisdiction of the cause of action alleged in the complaint against the defendant;"

and on the same day *judgment* was signed and filed, "that the complaint be dismissed" with costs.

(*See decree and judgment*, *Record*, pp. 8 and 9.)

To review the said judgment this writ of error has been brought.

Assignment of error.

"1st. That the judgment aforesaid, in form aforesaid given, was given for the said defendant in error against the said plaintiffs in error.

"2nd. That judgment was not given for the said plaintiffs in error against the said defendant in error, as demanded in the complaint.

"3rd. That the said circuit court of the United States for the southern district of New York held that the facts stated in the complaint herein do not constitute a cause of action.

"4th. That the said circuit court of the United States for the southern district of New York held that it, the said court, had no jurisdiction of this action.

"5th. That in and by said judgment the said circuit court dismissed the complaint herein with costs."

BRIEF OF THE ARGUMENT.

I. It is not true "that (the) court has no jurisdiction of the cause of action alleged in said complaint against (the) defendant." The action being one against a Federal official for acts done by color of his office, and the remedy provided by the customs administrative act not being available (inasmuch as the plaintiff does not "concede that the [sugar] is imported merchandise"), the jurisdiction of the court to entertain this action is entirely beyond question.

II. It is not true that the complaint "does not state facts sufficient to constitute a cause of action:"

1. Puerto Rico was *not*, in June or September, 1899, a "foreign country" *within the meaning of that term as used in the tariff act of 1897* (under authority of which, and of which *alone*, the defendant claimed the right to collect as duties the sums mentioned in the complaint).

2. Even if—in denial of the foregoing contention—the tariff act of 1897 had to be construed as in fact *purporting* to authorize the collection of duties on goods brought from Puerto Rico into New York in June or September, 1899, then, in that aspect of it, and to that extent, the act in question must be held *unconstitutional* and ineffectual to justify the exaction complained of in this case.

a. Congress can not "lay and collect" any "duties" save such as are "uniform throughout the United States;"

b. "Duties" collectible "on goods brought from Puerto Rico into New York in June or September, 1899," would have been duties *not* "uniform throughout the United States," Puerto Rico having been, ever since the ratification of the treaty with Spain (antedating the period in question), *a part of "the United States:"*

(1) Treaties "ceding" territory to the United States make the territory so "ceded" a part of the United States within the meaning of the provision of the Constitution as to the uniformity of duties throughout the United States;

(2) The treaty with Spain "ceded" Puerto Rico to the United States as of the date when such treaty became effective (a date antedating the period here in question): There was nothing to *postpone or suspend* the operation of the treaty as a *present cession* of the *island*, in the circumstance—the only one which has been suggested to that effect—that it (the treaty) provides that the Congress shall determine the civil rights and political status of *the native inhabitants* of the ceded islands and that the *Spanish-born inhabitants* may have one year in which to choose whether to preserve or abandon their allegiance to Spain.

POINTS.

I.

IT IS NOT TRUE "THAT (THE) COURT HAS NO JURISDICTION OF THE CAUSE OF ACTION ALLEGED IN SAID COMPLAINT AGAINST (THE) DEFENDANT." THE ACTION BEING ONE AGAINST A FEDERAL OFFICIAL FOR ACTS DONE BY COLOR OF HIS OFFICE, AND THE REMEDY PROVIDED BY THE CUSTOMS ADMINISTRATIVE ACT NOT BEING AVAILABLE (INASMUCH AS PLAINTIFF DOES NOT "CONCEDE THAT THE [SUGAR] IS IMPORTED MERCHANDISE"), THE JURISDICTION OF THE COURT TO ENTERTAIN THIS ACTION IS ENTIRELY BEYOND QUESTION.

The defendant's claim (in his "second ground" of demurrer) that the court has no jurisdiction of this action, is based, as appears by his brief in the court below, on the view "that the entire and only existing remedy for all claimants for duties alleged to be illegally exacted is to be found in the customs administrative act of June 10th, 1890, which has provided for a new course of procedure on behalf of such

claimants, repealed the pre-existing rights of action in such cases, and relieved the collector from liability for his decisions or actions as to customs duties."

In other words, the argument is that "the act of 1890" on the one hand *provided a* "*remedy*" (distinct from an *action*, such as the present one, *against the collector*), of which special remedy the plaintiffs here might have availed themselves to secure a decision of the issue they have sought to present in this suit; while on the other hand, the said act in effect *prevented the valid bringing of such an action as the present* by *repealing* (in S. 29) "sections 2931 and 3011" of the Revised Statutes ("providing for an exclusive statutory right of action"), and expressly (in S. 25) "relieving the collector from liability, &c."

To the contrary of this, we respectfully submit:

First.—That the "remedy" and the "procedure" provided by the customs administrative act of June 10th, 1890, have no application whatever to, *and are not available in*, cases which (like the present one) *are not* "*customs*" *cases at all* (the merchandise *not* having been "imported"); and,

Second.—That the act of 1890 has *not* prevented the valid bringing of such an action as the present, *in a case such as that set up by the complain therein*, by its repeal of sections 2931 and 3011 of the Revised Statutes and its provision that collectors should not be liable for or on account of any of the matters mentioned in that connection in S. 25 of the act.

I.—That the "remedy" and the procedure provided by the customs administrative act of 1890 are *not* available in cases which (like the present one) are not "customs" cases at all, has been distinctly laid down by this court in its unanimous opinion in the *Fassett* case, as the following quotations show:

> "It is *contended* on behalf of Fassett that when he, as collector, took possession of the yacht and *decided* that she was dutiable, the *only remedy* open to her owner was to pay under protest the duties assessed upon her, and in that way secure possession of her, with the right thereafter, as provided in sections 14 and 15 of the customs administrative act, of June 10th, 1890, 26 Stat., 131, 137, 138, to obtain a refund of those duties by taking an appeal from the decision of the collector to the Board of General Appraisers, and appealing, if necessary, from that board to the circuit court of the United States."
>
> "The idea embodied in the libel is, that *if the yacht was not an imported article*, the act of the collector in forcibly taking possession of her was tortious, *and, as that act was committed on the navigable* waters of the United States, the district court, *as a court of admiralty*, had jurisdiction, in a cause of possession, to compel the restitution of her. The libel presents for the determination of the district court, *as the subject-matter of the suit, the question whether the yacht is an imported article*, within the meaning of the customs revenue laws" (p. 483). "The libellant *had no other remedy* than the filing of this libel. *He has none under the customs administrative act*, of June, 1890. By §14 of that act, the decision of the collector as to 'the rate and amount' of duties chargeable *upon imported merchandise* is made final and conclusive, unless the owner, &c." * * * The appeal provided

for in §15 brings up for review in court *only* the decision of the Board of General Appraisers as to *the construction of the law*, and *the facts respecting the classification of imported merchandise*, and *the rate of duty imposed thereon under such classification. It does not bring up for review the question of whether an article is imported merchandise or not; nor, under §15, is the ascertainment of that fact such a 'decision' as is provided for.* The decisions of the collector from which appeals are provided for by §14 are *only* decisions as to 'the rate and amount' of duties charged *upon imported merchandise*, and decisions as to dutiable costs and charges, and decisions as to fees and exactions of whatever character. *Nor can the court of review pass upon any question which the collector had not original authority to determine. The collector has no authority to make any determination regarding any article which is not imported merchandise;* and *if the vessel in question here is not imported merchandise the court of review would have no jurisdiction to determine any matter regarding that question, and could not determine the very fact which is in issue under the libel in the district court, on which the rights of the libellant depended*" (i. e., the question *whether* the yacht *was* 'imported merchandise.')

"*Under the customs administrative act, the libellant, in order to have the benefit of proceedings thereunder, must concede that the vessel is imported merchandise, which is the very question put in contention under the libel*, and must make entry of her as imported merchandise, with an invoice and a consular certificate to that effect, *and thus estop himself from maintaining the fact which he alleges in his libel, that she is not imported merchandise.*"

In re Fassett, 142 U. S., pp. 486–7.

The principle of this case has never been repudiated or qualified by this court, and the only supposed authority against it which the learned district attorney was able to cite in the circuit court is the decision in "*Lascelles* v. *Bidwell*" (102 Fed. Rep., 1004), the entire report of which reads as follows:

"*Lascelles* v. *Bidwell*, (circuit court, S. D., New York, March 19, 1900). *Motion for preliminary injunction.* Charles Henry Butler, for the motion. Henry L. Burnett, U. S. Atty., opposed. *Lacombe*, circuit judge. Motion denied *on authority of Cruikshank* v. *Bidwell*, 176 U. S., 73. Complainant has an adequate, summary, and expeditious remedy at law *under the customs administrative act.*"

As the existence of "an adequate remedy at law," even though not "under the customs administrative act," afforded ample ground for the denial of the motion for an injunction, the specification of the customs act as affording the remedy at law, was clearly not of the essence of the ruling, but in the nature of a merely incidental *dictum*. It is hardly to be supposed that, had the learned circuit judge had distinctly in mind at the time of writing the reasoning and doctrines above quoted from the unanimous opinion of this court in the *Fassett* case, he would have announced his impression that Lascelles had a remedy "under the customs administrative act," without giving his *reasons* for thinking so, *notwithstanding* that the very essence of Lascelles' contention was that his Puerto Rico sugar "is not imported merchandise," and that this court has held in the *Fassett* case that

that is a contention which is not *raised*, but *surrendered*, by proceedings under the act mentioned, since, "in order to have the benefit of proceedings thereunder, (one) *must concede* that the (article) *is* imported merchandise * * * and * * * *estop himself from maintaining* the fact which he alleges, that (it) is *not* imported merchandise."

As the memorandum itself shows, Mr. Judge Lacombe denied the *Lascelles* motion for an injunction "on authority of *Cruikshank* v. *Bidwell*, 176 U. S., 73." The report of that case shows that an injunction was there denied on the ground that the "remedy at law" was adequate; but so far from there being any intimation or implication that such remedy at law was to be had "under the customs administrative act," the opinion distinctly points to *a suit against the collector* as constituting the remedy referred to (the *gravamen* of the complaint there, as here, being the *absolute lack* of authority on the part of the collector, instead of a merely *erroneous exercise* of authority vested in him):

> "The sole ground of equity jurisdiction put forward," declares the opinion, "is the inadequacy of remedy at law in that the injury threatened is not susceptible of complete compensation in damages. The mere assertion that the apprehended acts will inflict irreparable injury is not enough. Facts must be alleged from which the court can reasonably infer that such would be the result, and in this particular we think the bill fatally defective. The matter in dispute was averred to be 'the value of the said teas and the right to import teas.' Confessedly the value of these teas was known, and their destruction capable of being compensated by recovery at law. *The official character of the collector*, the provisions of the act, and the regulations of the Secretary of the Treasury in execution thereof *would not constitute a defense if the act were unconstitutional*" (which was what was alleged). *There was no intimation that the collector would be unable to respond in judgment*, and, moreover, section 989 of the Revised Statutes provides that *when a recovery is had in any suit or proceeding against a collector for any act done by him*, probable cause being certified, 'the amount recovered shall, *upon final judgment*, be provided for and paid out of the proper appropriation from the Treasury.' *The Conqueror*, 166 U. S., 110, 124."
>
> *Cruikshank* v. *Bidwell*, 176 U. S., 81, 82.

There can be no question that action by an administrative officer, in *a case other than that in which action by him is contemplated by the Statutes conferring his official authority*, is as completely unauthorized and unofficial as would be action under a statute which was *itself void as unconstitutional*. The statute would not protect him from personal liability any more in the one case than in the other. By analogy, therefore, the *Cruikshank* decision is an authority *against* instead of *for* the idea that the remedy provided by the customs administrative act is "the entire and only existing remedy" (or is one available at all) for those whose cause of action against the collector is not that he erred as to details of a customs case, but that as a mere trespasser he assumed to act officially in a case in which, inasmuch as there has been no importation of merchandise, he has no authority whatsoever to act at all.

It being thus apparent that the remark in the *Lascelles* case was only *obiter dictum*, and, moreover, a *dictum* inconsistent with the principle

of both the *Fassett* and the *Cruikshank* rulings of the Supreme Court (rulings which that Court has never repudiated, doubted, or qualified), we beg leave to submit, with all respect to Mr. Judge Townsend, that he was mistaken in declaring in his opinion in *Goetze* v. *United States* (103 Fed. Rep., 74) that the "preliminary question has been *disposed of* in the suit of *Lascelles* v. *Bidwell*," at least in the sense of *establishing the availability* of the remedy provided in the act of 1890 in cases in which, as in those of *Lascelles*, *Goetze*, and the present one, "the very question put in contention," namely, whether or not the merchandise had been "imported," *would be* "*conceded*" by proceedings under the act.

On the contrary the clear effect of the authorities cited, as well as of the principles of the subject, is undoubtedly that the "remedy" and the "procedure" provided by "the customs administrative act of June 10, 1890," have no application whatever to cases which (like the present one) *are not* "*customs*" *cases at all* (the merchandise not having been "imported"), and in which accordingly, the "illegality" complained of is not an *erroneous exercise* of the collector's authority *in a case in which he was authorized to act as collector*, but the *radical* "illegality" involved in his having, as a mere trespasser, assumed to act as collector *in a case not one of the kind of case* in which alone the statutes contemplated and authorized his acting officially.

2. Having thus seen that the defendant is in error in the first part of his theory as to our remedy—in his notion, namely, that the procedure provided by the act might have been available to us for securing a decision of the issue raised by the complaint—we beg now to submit that he is equally in error in the second part of that theory, since in point of fact (his argument to the contrary notwithstanding) the act of 1890 has *not* prevented the valid bringing of such an action as the present (*in a case such as that set up by the complaint herein*) by its repeal of sections 2931 and 3011 of the Revised Statutes and its provision that collectors should not be liable for or on account of any of the matters mentioned in that connection in section 25 of the act.

The defendant's inference from the repeal of the sections named and the declaration of "exemption from liability" in § 25—the inference, namely, that the right to sue the collector *in a case such as the present* no longer exists—*is based upon the assumption* that "the right to sue the collector *in a case such as the present*" *existed only by* virtue of *sections 2931 and 3011*, and upon the further assumption that the matters in respect of which § 25 declares the collector to be exempt from liability *include a* "*matter*" *such as that which constitutes the gravamen of our complaint*. Both assumptions ignore the essential distinction (recognized by this court in the *Fassett and Cruikshank* cases) between matters which are really "customs" matters and those which are not really such at all. Owing to their thus ignoring that distinction, both assumptions are erroneous, making fallacious the inference based upon them.

Consider, first, the repeal of sections 2931 and 3011. What does that "repeal" amount to? Simply the *substitution* of a *new* procedure *in* "*customs*" *cases* for the old procedure *in* "*customs*" *cases*. Those "sections" were portions of the *old* "customs administrative act" embodied in Title XXXIV of the Revised Statutes, the official heading of which is "*collection of duties upon imports.*" The act of 1890 is simply a *revision* of that system. Both the original and the revision *assume as a fact that merchandise is to have been* "*imported.*" Neither

had any bearing upon or reference to the remedy available to one whose grievance is that *the man who happens to be collector* has *assumed* to act as such *in a case in which, no "importation" having been made, he was not really authorized to act officially at all.* The "repeal" of the sections regulating the old procedure *in customs cases*, to make way for the revised procedure *in customs cases*, did not destroy the right of action in *non*-customs cases, for the simple reason that such last-named right of action (*against a mere trespasser*) *was not created by and did not depend upon or have any connection with the "sections" mentioned.*

What now about the provision of § 25 of the act of 1890, "relieving the collector from liability for his decisions or actions *as to customs duties?*" In the light of the *Fassett* distinction, this difficulty proves as unsubstantial as that of the repeal of the two irrelevant sections. Obviously, the "relieving of *the collector* from liability for his decisions or actions *as to customs duties*" cannot mean the exemption of Mr. *George R. Bidwell*, the individual, from liability for "decisions or actions" *having nothing to do with* "*customs duties*" and made or performed in a case in which, inasmuch as there has been no "importation," he did not and could not decide or act as, or in any sense *be*, the "collector" at all.

Indeed, the text of § 25 on its face shows that the exemption from liability thereby secured to the "collector" is strictly restricted to *customs* matters, and by no means extends protection to *the individual who, in customs cases, is collector*, in respect of "any determination regarding any article which is not imported merchandise," which kind of "determination" this court in so many words declares that "the collector has no authority to make" (142 U. S., 487). The section reads as follows:

> "SECTION 25. From and after the taking effect of this act no collector or other officer of the customs shall be in any way liable to any owner, importer, consignee, or agent of any merchandise, or any other person, for or on account of any rulings or decisions as to the classification of said merchandise, or of duties charged thereon, or the collection of any dues, charges, or duties on or on account of said merchandise, or any *other* matter or things *as to which said importer, consignee, or agent of such merchandise might under this act be entitled to appeal from the decision of said collector or other officer, or from any board of appraisers provided for in this act*" (26 Stat., 141).

This language clearly restricts the collector's exemption from liability to *matters as to which an appeal can be had under the act from the decision of the collector.* This court has held that, under the act—

> "*The court of review* (*can not*) *pass upon any question which the collector had not original authority to determine. The collector had no authority to make any determination regarding any article which is not imported merchandise*" (142 U. S., p. 486).

In other words, *no appeal can be had under the act* from "any determination (by the collector) regarding any article which is not imported merchandise." Consequently in a case in which the decision complained of is one "regarding (an) article which is not imported merchandise" the collector is *not* "relieved from liability" by § 25.

It thus becomes plain that neither the repeal of sections 2931 and

3011, nor the exemption provision in § 25 of the act of 1890, really prevent the valid bringing of an action against the defendant Bidwell, notwithstanding his collectorship, *in a case where the determination complained of was one which, because it regarded an article which was not imported merchandise, he "had no authority to make."*

It is true, indeed, that in his brief in the circuit court the learned district attorney categorically imputes to this court a decision inconsistent with this conclusion; but we respectfully insist that in this he was demonstrably mistaken.

His citation reads:

> "In the case of *Schoenfeld* v. *Hendricks* (152 U. S., 691, affirming 57 Fed. Rep., 568, in this circuit), the Supreme Court also held that 'the right to maintain an action at law against the collector to recover duties paid, *whether existing by virtue of the statutory or common law*' (*sic*), 'was *taken away by sections 25 and 29 of the customs administrative act* of June 10, 1890.'"

As a matter of fact the Supreme Court "held" nothing of the sort. It certainly did not hold that the "*common law*" "right to maintain an action at law against the collector" "was *taken away by sections 25 and 29 of the customs administrative act.*" Though appearing in the brief between quotation marks (precisely as it is above repeated), the language given as embodying the supposed "holding" nowhere appears in the report of the case in this court, either in the "headnotes" or in the opinion. On the contrary, the opinion affirmatively shows that what was "held" to have been "taken away" by the act of 1890 was simply the *statutory* right of action against a collector (*in customs cases*) until then existing under sections 3011 and 2931 of the Revised Statutes (152 U. S., 693); while the reason for holding the "common law" right of action unavailable *in such a case as Schoenfeld's* (which is of course all that *was* "held" or even intimated, *obiter*, in the *Schoenfeld* decision) is that indicated in the following statement in the opinion (p. 695): "We are of opinion that THIS ACTION would not lie at common law, *the money being required by section 3010 to be paid into the Treasury.*" In the light of the reason thus given, and on the principle *cessante ratione legis cessat ipsa lex*, it is clear that the principle of the *Schoenfeld* decision holds only in cases to which the requirement of "section 3010," that "the money * * * be paid into the Treasury," can itself be held to apply. Can that requirement be sanely held to apply to any but "customs" cases? Look at the text of the enactment in question:

> "SECTION 3010. All money paid to any collector of the customs, or to any person acting as such, for *unascertained duties* or for *duties paid under protest against the rate or amount of duties charged*, shall be placed to the credit of the Treasurer of the United States, and shall not be held by the collector or person acting as such, to await any ascertainment of duties, or the result of any litigation *in relation to the rate or amount* of duty legally chargeable and collectible in any case where money is so paid."

This section, being a part of Article XXXIV, on the "Collection of duties *upon imports*," would be *presumed* to apply only to cases *in which merchandise had been in fact* "*imported.*" Furthermore, the very wording of the provision *affirmatively* shows that it is only *money*

which the collector gets in "*customs*" *cases proper* that he is directed to "place to the credit of the Treasurer." The direction for immediate payment into the Treasury is in so many words explained to be made in order to prevent the money being "held by the collector to await" —what?—"any *ascertainment of duties*, or, the result of any litigation *in relation to the rate or amount of duty* legally chargeable, &c."

Now, in a case in which there *has been, in fact*, an "importation" of merchandise, the collector *has statutory authority*, for the purposes of the performance of his functions, *to decide officially, in the first instance*, all questions involved in the "*ascertainment*" of duties and the determination of their "*rate and amount;*" and he is *in such* cases *authorized to receive* "duties" paid before definitive "ascertainment," or paid "under protest *against the rate or amount* of duties charged." *Such* "duties," and such duties *only*—"duties" the amount of which has either not been "ascertained" at all, or not *conclusively* ascertained as against the objection of the importer—are, under § 3010, to be at once on receipt "placed to the credit of the Treasurer." *Where the essential* "*jurisdictional fact*" *exists*, of an actual importation from a foreign country, the collector's errors as to details do not make his acts unauthorized or unofficial, and therefore his collections, though subject to revision, are deemed *provisionally* valid and as having been made by authority of the Government, and they may therefore well be the subject of such a provision as that of § 3010, as to the paying of the money into the Treasury. But in a case in which there has been in fact no importation at all the individual who holds the office of collector has simply "*no* authority" at all, and his erroneously holding that there has been an importation does not give him authority, or convert an exaction of money by him upon that theory into an official or authorized collection of "duties" such as can be deemed to be either the "unascertained" duties or the "duties paid under protest against *the rate or amount* of duties charged," which (and which *alone*) the statute directs the collector to deposit in the Treasury. As this court has said in the *Fassett* Case, "The collector has *no authority* to make *any* determination regarding any article which is *not imported merchandise*" (142 U. S., 487). In such a case, therefore, he is a mere trespasser if he exacts money *as if* for "duties," and the law can not be supposed to have contemplated any such trespass by him, *nor*, therefore, to have provided for the "paying into the Treasury" of the *proceeds* thereof.

The *Schoenfeld Case* (152 U. S., 691) was in fact a "customs" case, there having been an importation of merchandise. The money sued for there had been paid "*for duties paid under protest as to rate or amount of duty charged, &c.*" To the money paid to the collector in that case, consequently, the provisions of Sec. 3010 literally applied. It was entirely appropriate, therefore, for the court to say, as it did: "We are of opinion that *this action* would not lie at common law, the money being required by sec. 3010 to be paid into the Treasury." To read this as intended to apply to a case materially different from the Schoenfeld case itself (as *not* being a "customs" case at all), would be to give it a sense in which it would be clearly *obiter dictum*.

Nor can it validly be urged against the maintenance of this action, that, *whether compelled thereto by Sec.* 3010 *or not*, the defendant, supposing as he did that this *was* a customs case, *did in fact* deposit the money here in question, and his having done so should have the same

effect toward exempting him from liability as it would have had in a case to which Sec. 3010 applied. In the first place, this supposed "actual," though voluntary, payment into the Treasury *does not appear* by the record, and is not to be presumed, it being, *ex hypothesi*, not required by law. Secondly, the reason why a deposit of the moneys required by Sec. 3010 to be deposited exempts the collector from personal liability is simply this, that by that very requirement the United States adopts the collection as *its own act*, and takes its agent's place in any litigation as to the propriety of such collection (as respects "rate and amount"): This reason obviously does not hold where the collector's act is one which is wholly unofficial and unauthorized, as being one concerning "an article which is not imported merchandise." That his having acted in good faith, and in fact deposited the money in the Treasury, is not in law a bar to a "*judgment*" against him (as distinguished from an *execution*) is made entirely clear by the explicit provisions of Section 989 of the Revised Statutes, which was *not* "repealed" by the law of 1890, but, on the contrary, has been distinctly recognized by this court in cases much later than the *Schoenfeld* case (*The Conqueror*, 166 U. S., 124; *Cruikshank* v. *Bidwell*, 176 U. S. 81) *as being in full force and operation*. It reads as follows:

> SEC. 989. Whenever a *recovery* is had in any suit or proceeding *against a collector* or other officer of the revenue for any act done by him, or *for the recovery of any money exacted by or paid to him and* BY HIM PAID INTO THE TREASURY, in the performance of his official duty, *and the court certifies that there was probable cause* for the act done by the collector or other officer, or that he acted under the directions of the Secretary, or other proper officer of the Government, *no* EXECUTION *shall issue against such collector or other* officer, but the amount so *recovered* shall, *upon final judgment, be provided for and paid out of the proper appropriation from the Treasury.*"

It would seem to be beyond contradiction that this section—which is quite as clearly in force as "section 3010," or the "Act of 1890"—distinctly proves the policy of the law to be to *permit*, in *some* cases, "a *recovery*" (*i. e.*, a *judgment*) "against a collector * * * for the recovery of any money exacted by or paid to him *and by him paid into the Treasury*" (though *execution* is not to issue against the official, and the "final judgment" against him is to be paid out of the Treasury, if the court certifies to "probable cause, &c."). In what sort of a case could this provision find scope and application if not in a case *such as the present*, in which, the article not being imported merchandise, the intervention of the collector was *wholly unauthorized* and therefore unofficial, instead of being simply erroneous as to details? In the teeth of this statute, declared in the *Cruikshank* case to be in force, it seems impossible to insist that the collector's having paid the money into the Treasury is in any way incompatible with the "recovery" of a "final judgment" against him therefor.

POINT II.

It is not true that the complaint "does not state facts sufficient to constitute a cause of action":

1. Porto Rico was NOT, *in June or September, 1899, a "foreign country"* WITHIN THE MEANING OF THAT TERM AS USED IN THE TARIFF

ACT OF 1897 (*under authority of which, and of which* ALONE, *the defendant claimed the right to collect as duties the sums mentioned in the complaint*).

2. *Even if—in denial of the foregoing contention—the Tariff Act of 1897 had to be construed as in fact* PURPORTING *to authorize the collection of duties on goods brought from Porto Rico into New York in June or September, 1899, then, in that aspect of it, and to that extent, the act in question must be held* UNCONSTITUTIONAL *and ineffectual to justify the exaction complained of in this case.*

a. Congress cannot "lay and collect" any "duties" save such as are "uniform throughout the United States";

b. "Duties" collectible "on goods brought from Porto Rico into New York in June or September, 1899," would have been duties NOT *"uniform throughout the United States"; Porto Rico having been, ever since the ratification of the treaty with Spain (antedating the period in question),* A PART OF THE UNITED STATES":

(1.) Treaties "ceding" territory to the United States make the territory so "ceded" a part of the United States within the meaning of the provisions of the Constitution as to the uniformity of duties throughout the United States.

(2.) The treaty with Spain "ceded" Porto Rico to the United States as of the date when such treaty became effective (a date antedating the period here in question). There was nothing to POSTPONE OR SUSPEND *the operation of the treaty as a* PRESENT CESSION *of the* ISLAND, *in the circumstance—the only one which has been suggested to that effect—that it (the treaty) provides that the Congress shall determine the civil rights and political status of* THE NATIVE INHABITANTS *of the ceded islands and that the* SPANISH-BORN INHABITANTS *may have one year in which to choose whether to preserve or abandon their allegiance to Spain.*

ARGUMENT.

PROPOSITIONS OF THE APPELLANT.

These cases present the question whether under the Constitution the Government is authorized to impose a tax upon merchandise brought into the port of New York from the island of Puerto Rico after the cession of that island to the United States by formal treaty, duly ratified and proclaimed.

Such a tax has been here imposed on the supposed authority of the Customs Revenue Act of 1897 (Dingley Act).

The Dingley Act provides for the imposition of a customs duty on sugars imported from foreign countries, and notwithstanding the acquisition by the United States of the island of Puerto Rico under the treaty with Spain of December 10th, 1898, ratifications of which were exchanged on the 11th day of April, 1899, the collector of the port of New York exacted the payment of customs duties on sugar brought into said port from Puerto Rico in the months of June and July, 1899, as though it had been imported from a foreign country.

As a basis for the examination of this question we submit the following propositions:

A. A treaty duly entered into is law, and has the force of a statute until superseded by subsequent enactment.

B. The treaty of Paris ceded Puerto Rico to the United States. Puerto Rico then came completely under the sovereignty and dominion

of the United States. The political map of the world was changed and Puerto Rico became geographically a part of the United States, or of what Marshall called the "American Empire," under the statutory name of PORTO RICO.

C. The clause of the treaty leaving the determination of the "civil rights and political status" of the native inhabitants to Congress was merely declaratory of the power given by the Constitution to withhold political rights and franchises and to establish civil government and enact municipal law in all places where no State government exists.

D. All territory lawfully acquired and taken under sovereign jurisdiction is a part of the United States.

E. The Constitution is a CHARTER OR GRANT OF POWERS conferred upon the Federal Government by the PEOPLE OF THE UNITED STATES. The Federal Government has no existence outside of this Constitution. Hence it is a confusion of terms to speak of territory to which the United States has acquired title as not being within our "Constitutional boundaries" or incorporated into the United States. It is a misapprehension of the nature of our institutions and of the function of the organic law of our national existence, known as the "Constitution," to speak of any part of the nation being beyond its boundaries, or to speak of its "extension" over portions or over all of the national territory. There is no *boundary* to the Constitution other than the whole sphere of the activity of the Federal Government. Outside of that sphere, beyond that boundary, the Federal Government can only act by usurpation—a government of force—not of law, and officials assuming to act for the United States outside of the prescriptions of the Constitution are, however well intentioned, outside of the law.

F. This is the elementary rule of constitutional functions. But it does not follow that, because all government finds its sole authority in the constitutional grant, every prescription of the Constitution, its delegations, limitations, and prohibitions can always and at all places be made applicable to all governmental action in all circumstances. These are applicable according to varying place and circumstance.

The unquestioned proposition that the Government is powerless to act outside of the charter of its existence does not of necessity imply that the Bill of Rights—the prohibition against cruel and unusual punishments—operates at once throughout any territory over which the Government of the United States exercises jurisdiction—military, transitory, or permanent.

G. Territory held by military occupation during hostilities or as an incident thereto is subject to the rule of the President as Commander in Chief under the Constitution. No limitations are placed upon his power as Commander in Chief, save such as must be implied—*i. e.*, to wage only civilized warfare. But the freedom from limitation does not arise from the inapplicability of the restraints of the Constitution; on the contrary, it is a freedom granted by the Constitution, which gives him, in case of war, the usual powers of military commanders recognized by international law.

H. Territory acquired *by the law or treaty-making power*, and hence coming under the sovereign jurisdiction of the United States, may be governed by the *Executive* until *Congress* undertakes to govern it.

As long as war lasts the Executive continues his military rule as Commander in Chief. Upon ratification of the treaty of peace he continues his rule under his general duty and power to execute the

laws, but as a *de facto* civil government, pending any action of Congress for the government of the new territory. This doctrine was followed by the political authorities in the case of California and was defined and upheld in Cross *v.* Harrison (*vide* the opinion of Judge Magoon, legal adviser to the War Dept., Sen. Doc. No. 594, 56th Cong., 1st sess.).

But in any event the new territory is part of the United States pending its definite organization under the powers given to Congress.

I. As soon as the military status ceases and a *de facto* civil government is carried on, even by army officers, the civil rule being reestablished, it is subject to the constitutional requirements. These territories are but "political subdivisions of the outlying dominion of the United States." Congress is supreme in legislating for them; it has all the powers of the people of the United States, except such as have been expressly or by implication denied and prohibited by the terms of the Constitution.

J. Within those prohibitions or limits Congress has supreme power. These limits and prohibitions, however, are its "constitutional boundaries," outside of which it may not go.

The only question, therefore is:

Has Congress ignored these prohibitions and gone beyond these limits in its government of Porto Rico; in other words, violated the constitutional restrictions which lie at the center and foundation of the Federal powers?

K. The *Dingley Act* in terms imposed a duty on goods imported from foreign countries. It could have no application to goods from Porto Rico, which ceased to be a foreign country upon the ratification of the treaty ceding it to the United States. To apply it to Porto Rico would make it obnoxious to the constitutional prohibition (Art. I, Section VIII) which prescribes that "all duties, taxes, and imposts shall be uniform throughout the United States."

The tax was levied at the port of New York on sugar from Porto Rico. No tax was leviable upon like merchandise from any other part of the United States. This is not the uniform taxation required by the Constitution.

This legislation was enacted by Congress as the lawmaking body for the whole United States and affected every port in the United States. It was not a local tax or excise for the benefit of a particular locality.

L. The precedents adduced from our former acquisitions of territory do not militate against this view.

M. The inhabitants of the ceded territories are citizens of the United States in the sense in which all persons owing immediate and complete allegiance to the United States and inhabiting its territory are citizens. In that sense the word citizen is the equivalent of "national" or subject. (See Senator Foraker's report on Porto Rico, No. 249, Feb. 5, 1900, p. 12.)

N. While the argument from the consequences is not always the best argument, it is perhaps in this case, owing to its importance, relevant.

The only consequence of the construction contended for to which the Government objects is the uniformity of duties clause. All the other rights secured to citizens and others within the United States by the prohibitions granted by the Constitution are admittedly applicable. The danger feared is the possibility of the American markets being

thrown open to the products of the ceded territories. It is not an objection which the court can take into consideration in deciding this case.

I.

UNDER THE CONSTITUTION OF THE UNITED STATES A TREATY IS THE SUPREME LAW OF THE LAND (ARTICLE VI).

That this proposition has never been dissented from or doubted in this court is well known. It would not be necessary to discuss it now were it not for the fact that it has recently been challenged and a novel doctrine has been broadly asserted. It has been claimed that a treaty is a mere contract between two nations of no effect as law within the United States until given such effect by act of Congress; in other words, the treaty is of no legal force save as an international obligation.

This suggestion can not appeal to this court. The question was settled positively, clearly, and without possibility of equivocation by the "Great Chief Justice:"

> "A treaty is in its nature a contract between two nations, not a legislative act. * * * In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature wherever it appears, of itself, without the aid of any legislative provisions." (Marshall, C. J., Foster *v.* Neilson, 2 Peters, 253.)
>
> * * * "A treaty, it is true, is in its nature a contract between two nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. * * * If the treaty operates of its own force and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act to be repealed or modified at the pleasure of Congress. In either case, the last expression of the sovereign will must control."
>
> *Chinese Exclusion Case* (130 U. S., 600).
>
> "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. * * * But a treaty may also contain other provisions which confer certain rights upon the citizens or subjects of the nations residing in the territorial limits of the other which partake of the nature of the municipal law."
>
> * * * "The Constitution gives it (the treaty) no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date."
>
> *Head Money Cases* (112 U. S., 597).
>
> *See also Geoffrey* v. *Riggs* (133 U. S., 258–271).

II.

BY THE TREATY OF CESSION PORTO RICO BECAME A PART OF THE UNITED STATES.

By the treaty of Paris Spain ceded Porto Rico to the United States, and by such cession, we submit, Porto Rico became a part of the political entity known as the United States.

It is now claimed, and as we believe for the first time by a court of the United States, that territory may come under the complete and absolute sovereignty and dominion of the United States and yet remain foreign.

Judge Townsend has held in the case of Goetze *v.* The United States that although the title to the soil of Porto Rico is in the United States and no other country has any rights there of any character, yet Porto Rico was, subsequent to the treaty, a foreign country within the meaning of the statutes of the United States, imposing duties upon goods coming from foreign countries.

The reasoning by which this conclusion is reached is so novel and important that it will justify a close examination.

He says:

> "By cession the title to the soil became *de jure*, but in the status of the islanders as foreigners, and so in the status of Porto Rico as a foreign country no change was to be made until Congress should determine its character." (103 Fed. R., 17.)

Again:

> "Thus we see that in all previous cessions of territory there has been a special provision in the treaty for *incorporating the inhabitants* within the United States. Whether a treaty stipulation would be sufficient to incorporate *the territory into the Union* is not clearly established. * * * There is (in the treaty of 1898) no provision for the incorporation of *the inhabitants* within the Union as there has always been in prior treaties." (103 Fed. R., 76.)

Further:

> "There has been found, then, no reason either on principle or authority why the United States should not accept sovereignty over territory without admitting it as an integral part of the Union or making it bear the burden of the taxation uniform throughout our nation. To deny this power is to deny to the nation an important attribute of sovereignty, etc." (103 Fed. R., 86.)

The sentences quoted contain the reasoning of the Government, and, as we believe, the fallacy upon which their position is based. These fallacies are endorsed by the Attorney-General, who says in his Goetze brief, p. 4:

> "That the treaty-making power—the President and the Senate—as evidenced by the language of the treaty of Paris, did not intend to make Porto Rico and the Philippine Islands integral parts of the United States, but intended in several particulars to reserve their final status for adjustment by Congress."

And at page 8:

> "There is no doubt that it was the intention of the treaty of Paris *not* to make the ceded islands a part of the United States."

The Government of the United States may sustain as to any given territory three relations:

(1) Sovereign jurisdiction.

(2) Temporary occupation of foreign soil.

(3) Foreign territory over which it has no jurisdiction.

In the last case it has no relations with the inhabitants; in the second it is merely the *de facto* sovereign over certain territory; this sovereignty can not under the Constitution affect the political status

of the inhabitants since the allegiance which they owe to the United States is but temporary and only as an incident of war, their former allegiance reverting with the return of the former sovereign. (*The Castine case*, *U. S.* v. *Rice*, 4 Wheat., 246, and *Fleming* v. *Page*, 9 How., 615.)

In the first case, and that is the position of Porto Rico, the power of Congress over the political status is plenary. Political rights are franchises which may be given or taken away by Congress in the territories, *i. e.*, the places over which it has exclusive local jurisdiction.

Murphy v. *Ramsey* (114 U. S., 15).

The treaties to which Judge Townsend referred endeavored to settle the political status of the countries ceded by provisions that they should be admitted into the Union as soon as possible, and the Attorney-General (Goetze brief, p. 66) emphasizes this position.

Granting that by the treaty the inhabitants of Porto Rico acquired neither civil or political rights, yet that did not make Porto Rico a foreign country.

A foreign country is a country under a sovereignty other than that of the United States.

> "By a foreign port may be understood a port within the dominions of a foreign sovereign and without the dominions of the United States."
>
> Mr. Justice Story in *U. S.* v. *Heyward* (2 Gall., 501).
>
> See also Chief Justice Spencer in *King* v. *Parks* (19 Johns., 375).
>
> Also Treasury Regulation 835, approved in *Stairs* v. *Paisley* (18 How., 526).

This Porto Rico admittedly was not.

What Judge Townsend meant, then, was simply that until Congress had legislated, the inhabitants had no political rights, and their private or civil rights remained unchanged.

Incorporation of the inhabitants within the United States means, if anything, that the inhabitants shall be made part of the body politic, *i. e.*, enter the Union as a State, as was intended in the case of Louisiana, which we shall hereafter examine.

This is very different from making *territory* a part of the United States, which is all the present case contends for.

The fact that the inhabitants of a country ceded by treaty to the United States are still under the military authority of the Government awaiting the action of Congress organizing a local government is entirely apart from the question as to whether the territory, regardless of the status, race, or color of its inhabitants, is a part of the United States.

Let us assume that Porto Rico was inhabited by roving Indian tribes and had no other inhabitants, could it be contended that although we had acquired title to the soil, the Indians being tribes which were not, while maintaining their tribal relations, citizens of the United States, therefore the territory in question was a foreign country?

Certainly not.

As the Attorney-General says (Goetze brief, p. 6):

> "The basis of the custom laws is not ownership, but (1) the *geographical* origin of the shipment, and (2) the nature of the goods."

The learned judge and the Attorney-General confuse the idea of acquiring territory, and thus enlarging the boundaries of the United States, with the withholding of political rights. They make the one depend upon the other. This is clear from the expression (in the Goetze case) that the United States "may accept sovereignty without admitting it (the territory) as an integral part of the Union." If by an integral part of the Union he means a political part, *i. e.*, a State, we assent to the proposition.

The political power of the Union is in the inhabitants of the States—those of the territories have none.

The incorporation of new territory into our *body politic* would and must mean the incorporation of the inhabitants into our political people, *i. e.*, into people of the States.

This we do not contend for.

Had nothing been said in the treaty as to the inhabitants, their political status and within certain limitations their civil rights would have been entirely within the power of Congress. In previous treaties acquiring territory the United States had usually promised the ceding country that its inhabitants should have admission to statehood.

This had been the usual course.

In the present instance the American Government, desiring that the disposition of the question should be left entirely to the Congress, was not satisfied to negatively refrain from promises to Spain, but, in order that no misunderstanding should occur in the future, expressly stipulated with Spain that Congress should determine these questions. It would have been proper for Spain to have asked that her subjects in Porto Rico should be admitted to and incorporated in the Union of States. She did not do so, but left the matter absolutely to the United States.

(Vide discussion of Peace Commissioners, p. 87 of this brief.)

This clause in the treaty then left the United States free to *deal with the inhabitants* as she chose—subject always to the prohibitions of the Constitution.

Its sovereignty over the territory is thus emphasized, not diminished.

III.

EFFECTS OF ANNEXATION.

The fallacy underlying all the reasoning of the learned court below, and of the counsel for the Government, seems to be based upon the following reasoning:

> "We have the authority of Fleming *v.* Page, that acquiring title to the soil of the territory making it part of the United States as regards other nations *does not bring it within the sphere of the Constitution*. If, then, it is not acquisition of soil which extends our constitutional boundaries, what does accomplish this result? In order to extend the boundaries recognized by other nations, the extension of dominion by acquisition is sufficient."

To speak of soil coming within the sphere of the Constitution seems to us to be a misuse of language. It was held, and rightly held, in Fleming *v.* Page, that where the armies of the United States had overrun, conquered, and held an extent of territory, other nations would recognize that the United States was a *de facto* Government in and over such territory.

This is an elementary rule of international law which we do not question.

This was *occupation*, not *acquisition*.

How the country over which the authorities of the United States had established a *de facto* government was to be organized and governed, is a question with which international law has no concern. Under the Constitution of the United States the Government has power to wage war and to carry out all the duties necessary and incident to the waging of such war. When it occupies foreign territory it is doing so in pursuance of a power delegated to it by the Constitution, and while the Constitution as such does not affect the territory or soil over which the United States troops exercise jurisdiction, it is by reason of the grant of power contained in the Constitution that the United States troops are there carrying on legitimate warfare, and are not mere adventurers or revolutionists.

What the learned judge means by bringing the territory within the sphere of the Constitution we do not exactly understand.

If he means that our jurisdiction there is not exercised in pursuance of the Constitution, we claim that he is incorrect in his postulate of constitutional law. If, however, he means that the jurisdiction is only temporary military jurisdiction, and that the clauses of the Constitution in regard to the bill of rights and uniformity of taxation do not and can not apply, we accede to his view entirely.

The confusion in his reasoning seems to arise from want of appreciation of the fact that the Constitution applies both to peace and to war. That there is, so to speak, a Constitution for peace and one for war.

This is no new theory, but was clearly and ably expressed by John Quincy Adams in the House of Representatives in 1836.

He said:

> "There are, then, in the authority of Congress and in the Executive, two classes of powers altogether different in their nature and often incompatible with each other—war power and peace power. The peace power is limited by regulations and restricted by provisions in the Constitution itself. The war power is only limited by the usage of nations. This power is tremendous. *It is strictly constitutional*, but it breaks down every barrier so anxiously erected for the protection of liberty and of life."

This war power is, then, unlimited, except by the limitation which may fairly be implied from the Constitution that the war allowed to be waged shall be civilized warfare; that is to say, warfare according to the rules and regulations recognized by civilized nations, not warfare as known to and practiced by the Apaches and Zulus. That in carrying on such warfare in accordance with the public law of the world the Government of the United States has the right to exercise a temporary jurisdiction over territory belonging to another nation is unquestioned. That jurisdiction, however, is and must remain temporary, until either the treaty-making or law-making power of the Government has acted.

The President, as Judge Taney said, can not enlarge the territorial boundaries of the United States. The nation whose soil we are occupying and whose jurisdiction we have temporarily ousted has what might be termed in private law a right of reverter, and when the

United States withdraws its troops the world recognizes that the sovereignty belongs to the nation temporarily dispossessed. The boundaries could not "be enlarged or diminished as the armies on either side advanced or retreated." (*Fleming* v. *Page*, *9 How.*, *615.*)

But, and here we think the learned court in the Goetze case failed to appreciate the distinction, if the law or treaty making power enacts that the territory over which the military arm of the Government has extended shall come under the permanent absolute sovereign jurisdiction of the United States, then, and then only, a new and different status arises. "The United States, it is true, may extend its boundaries by conquest or treaty * * * but that can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war." (*Fleming* v. *Page*, 9 How., 614.) The former sovereign then loses all right of reverter and the territorial limits of the United States are in so far enlarged. (See *Cross v. Harrison*, 19 How.) It is, therefore, erroneous to say that "it is not *acquisition* of soil which extends our constitutional boundaries." What was meant is probably that *occupation* of soil did not extend our boundaries.

"Constitutional boundaries," we submit, is a misleading if not meaningless term. The Constitution is the life of the Government of the United States. Wherever that Government goes it goes by virtue of that Constitution or grant from the sovereign people which made the Government and which gave it as a government certain powers and withheld from it others. When, therefore, the Government of the United States was in Porto Rico, in Cuba, and in the Philippines during the war with Spain, it was because the Constitution gave it the right to wage war. The constitutional boundaries, therefore, if the phrase be claimed to have any meaning, we must again insist can only mean the entire sphere of activity within which the Government moves.

We repeat here the contention of the Government:

> "In order to extend boundaries recognized by other nations the extension of dominion by conquest is sufficient. To extend *constitutional boundaries* there must be some extension of organic law to the inhabitants or of institutions over the territory. The sphere of application of the Constitution is determined not by considerations of title to land, but by recognition of the political status of its inhabitants" (opinion in the Goetze case); or, as the Attorney-General phrases the same contention, "acquired territory as [is] neither bound nor privileged by that instrument until brought within its operation either by express compact in the treaty or by act of Congress." (P. 10, Brief.)

The difference between our position and the reasoning of the learned judge and the Attorney-General is fundamental and admits of no compromise.

If they be correct, we were in Porto Rico from the treaty of peace down to the recent act for the government of that island without any constitutional authority.

If this be so, our Government and officers had no warrant for their acts in the Constitution, and, however well-meaning they might have been, they were in law mere usurpers; they were acting without the law and without the authority of the sovereign creating the law.

Granting that the title to the soil came rightfully to the United

States; that the island was completely under its dominion and jurisdiction, all its agencies in that island and all its actions there were in pursuance of the Constitution.

By this we mean—and we desire to make this point very clear, as it seems to us that misconception of its force has led to the fallacy underlying the decision under consideration—that the agencies of the Government acting in Porto Rico had the powers and only the powers conferred by the Constitution, and that in their actions there they were subjected to all its applicable limitations, restrictions, prohibitions, or delegations.

IV.

THE EXTENSION THEORY.

The clear effect of annexation as shown in the point above is sought to be avoided by a theory that the Constitution extends to certain places and not to others.

The so-called extension of the Constitution has been a premise upon which much reasoning has been based. This reasoning we believe to be fallacious, because the premise is a misleading one.

Our claim is that the Constitution as such can not be extended by the legislature. This use of the term "extension" is a misnomer.

The cases relating the application of the constitutional provision in regard to jury trials in the District of Columbia and in Utah have been fully discussed in the other cases now pending before this court, and to do so here would thus involve endless repetition. The cases to which we refer are the following:

Reynolds v. *United States* (98 U. S., 145).
Callan v. *Wilson* (127 U. S., 540).
Springville v. *Thomas* (166 U. S., 707).
Bauman v. *Ross* (167 U. S., 548).
Thompson v. *Utah* (170 U. S., 343).
Capital Traction Co. v. *Hoff* (174 U. S., 1).
American Publishing Co. v. *Fischer* (166 U. S., 464).
Black v. *Jackson* (177 U. S., 363).

These cases decide that the Congress can not make any law in violation of the prohibitions of the Constitution.

In order, however, to avoid the conclusion that these cases authoritatively settle the proposition that Congress in legislating for the Territories is bound by the limitations expressly contained in the Constitution, the learned counsel for the Government claim that in all the cases cited Congress had legislated that Constitution into the Territories, *i. e.*, *extended* the Constitution. Hence it was there in force by Congressional action, and the cases referred to were properly decided.

It is true that with one possible exception this theory is nowhere foreshadowed in these decisions. They are all based on the Constitution itself, not the Constitution by act of Congress.

Passing this objection, however, the position criticised is unsound for the following reasons:

(1) If the Constitution is in the Territories as an act of Congress, it is a mere law, and can be recalled in whole or in part by the same power that projected it.

(2) The Constitution is a constitution or creation of a government,

not a system of laws applicable to any particular territory. The Government created thereby has jurisdiction over certain territory, but the Constitution only affects the territory indirectly because of its operation upon the Government. To extend the Constitution to a territory does not establish a government for the territory. It can be changed, modified, abrogated—it can not be extended. The Government which it has ordained may, in the march of time, rule all the peoples of the earth, but the Constitution would not be thereby extended—the same Government would have extended its dominions, but the Constitution would be the same instrument operating in the same way, viz., upon the Government.

(3) The organic acts for the Territories and the Revised Statutes enact that no law shall be passed for the Territories "inconsistent with the Constitution." Assuming for the argument that the contentions of counsel for the Government are correct, to the effect that the Constitution was only made for and can only apply to the States of the United States, we must then read into all the general prohibitory clauses of the Constitution the word States, *e. g.*, Congress shall make no law respecting an establishment of a religion *within the States*.

No person shall be held to answer for a capital or otherwise infamous crime "within the States" unless on a presentment, etc.

Thus read there would have been nothing inconsistent with the Constitution in the laws held unconstitutional in *Callan* v. *Wilson*, or *Springville* v. *Thomas*. If the Congress was allowed by the Constitution to enact laws for the trial of capital cases without jury in the Territories, then such laws are not inconsistent with the Constitution. The truth is that the legislation of Congress on this point was merely declaratory of its own powers. It knew that laws violating the prohibitions were "inconsistent with the Constitution" wherever civil government prevailed. If the views of the learned Attorney-General are correct, the legislation of Congress was the merest nullity because none of the laws declared unconstitutional are inconsistent with the Constitution read in the light of his novel theory.

It is respectfully submitted that Congress in establishing a government in the Territories and enacting an organic act defining the powers of the local legislature used out of abundant caution the language cited as part of one complete scheme, a portion of which was merely declaratory.

The Constitution is not a physical substance. It is in the nature of a grant or power, or what would be termed, in private law, a power of attorney. A real Constitution is a grant of rights or powers by a sovereign. The sovereign can not be limited, for he is the source of all law. (Judge Matthews in *Yick Wo* v. *Hopkins*, 118 U. S., 370.)

If the sovereign, so called, is limited by some external power, then he is not the real sovereign; it is the power imposing the limitation that possesses sovereignty. This is so because sovereignty is something which can not be limited. It is the ultimate power. The sovereignty in the United States is in the people of the States.

It was contended during a long period of our history, and the contention finds adherents in our day, that the sovereignty of the United States was in the States of the Union, and that they, as States, and not the people, created the Constitution.

In the great case of *McCulloch* v. *Maryland*, (4 Wheat., 416), it was argued by one of the ablest advocates of that theory that the Consti-

tution was created by the acts of the sovereign and independent States. Chief Justice Marshall met the proposition and answered it.

He said:

> "To the formation of a league such as was the Confederation the State sovereignties were certainly competent. But when, 'in order to form a more perfect union,' it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring to the people, and of deriving its powers directly from them, was felt and acknowledged by all.
>
> "The Government of the Union, then (whatever might be the influence of this fact on the case), is emphatically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them and are to be exercised directly on them and for their benefit.
>
> "*This Government is acknowledged by all to be one of enumerated powers.*"

The limitations of the Constitution upon the Federal Government are not limitations upon the American nation.

The American nation is sovereign.

It can go where it wishes, can act where it wishes, acquire territory where it wishes, treat the inhabitants as it wishes, and its powers are only limited by the physical force which may be brought to bear against it by other sovereigns.

But the Government is not sovereign.

Again we desire to respectfully submit that a great deal of the reasoning upon which our opponents rely is based upon the inability to distinguish this salient fact: *That the people of the United States are sovereign, and that the Government is not, is the great fact which distinguishes our constitutional law from that of most of the civilized nations of Europe.*

It was a great departure from and a great improvement upon the political science and upon the law and institutions which had preceded it. It did not make us a crippled nation, as the Attorney-General suggests, but a nation that has permanently protected itself against usurpations by its own agents.

The court below said:

> "If the United States is to be denied this common attribute of sovereignty, it must be admitted that the treaty of Paris is so far forth unconstitutional; but if our nation has this power in common with other nations, then the treaty is valid."

Here, again, we find this precise fallacy, the confounding of the nation with the Government. If the Government possesses all the powers of the nation, then there is no question before the court for decision.

To state that because other nations or states possess certain powers the *Government* of the United States must possess them, or the nation be a crippled one, is an absurdity.

The difference between the other nations referred to and the United States is that in those nations the body of officials constituting the government are endowed by the people with all the powers of the state or of the sovereignty. They can take property without due process of law; they can try in any mode which they may desire; they

can abridge the freedom of the press; they can violate all those rights which we are accustomed to call sacred and inalienable.

The United States as a SOVEREIGN PEOPLE can do all these things, but they were unwilling to allow their officials to do them, and until their ideas shall have changed, so that they no longer believe certain rights important or fundamental, these limitations placed upon the Government will doubtless remain there.

But to argue from this that the sovereign nation called the United States is any less powerful than other nations, or can not pursue any course or policy which it may desire, is, we submit, due to a failure to appreciate the basic elements of our constitutional law.

"The *de jure* title to the soil," says the learned judge, "was in the United States, *but its inhabitants were foreigners to the Union*, and the provision for the uniformity of duties had no application there."

If by foreigners to the Union he means persons without political rights, then we acquiesce in the proposition. Citizens of the United States residing in the District of Columbia or in the Territory of Oklahoma, or residing abroad and having lost their residence within the States of the Union, are then foreigners to the Union.

Many, if not most, of the provisions of the Constitution may be inapplicable to the inhabitants of Porto Rico, but this is true of many inhabitants of the United States. Aliens of all races, whether Aryan or Mongolian, inhabiting the United States, may in this sense be foreigners to the Union, yet they possess certain rights which the Government can not infringe (Yick Wo *v.* Hopkins, 118 U. S., 370), "not because those provisions were enacted for them, but because they are essential limitations inherent in the very existence of the American Government." (Secretary Root's report of 1899.)

The Constitution does not act directly upon the people of Porto Rico or the United States.

It is upon *the Government* that the Constitution acts directly.

The officers of the Government can not take property within the District of Columbia without due process of law. They can not try a man in the Territory of Oklahoma without indictment by a grand jury and trial before a petit jury and with the other safeguards known to the common law, and yet the individual whose property is so protected in the District of Columbia, or whose life is so safeguarded in the Territory of Oklahoma, may not be, and often is not, a citizen either in the general or political sense and has no direct relations to the Constitution; he is an inhabitant of the United States, and as such (temporarily subject to its jurisdiction) he is entitled to certain rights because the people of the United States have chosen to place certain limitations on the Government.

The people may take his property without due process of law and they may try him without a jury, if they so desire. They have elected to do otherwise, and until they terminate that election he possesses immunities against the action of the Government.

In other words, there are certain spheres within which the Government, at least under normal circumstances—that is to say, peace—can not tread, by reason of those inhibitions in the Constitution. The inhabitant has rights, or what may be better called, viewed at least from the Government standpoint, immunities.

While the military status lasted the prohibitions and limitations of the Constitutions did not apply.

Martial law is the will of the commander—that is to say, it is no law—and, therefore, while martial law existed by virtue of the Constitution, the Porto Ricans had no rights thereunder because the Constitution granted them none.

It is this absence of immunities on the part of the inhabitants of territory under the sovereign dominion of the United States DURING THE EXISTENCE OF MILITARY GOVERNMENT which the learned judge apparently had in mind when he speaks of the Porto Ricans being foreigners to the Constitution. The Constitution did not spread about them its protecting ægis, because during the military period the usual limitations did not apply.

The Constitution does not apply as a whole to every action of the Government in every particular locality. Wherever and however acting, *it is acting under some clauses or provisions of organic law and may not be affected by others.*

There are, in other words, in our system, broadly speaking, two kinds of government permitted by the Constitution. (1) *Military government*, which means the suspension of all immunities, and (2) the normal or peace Constitution. This may in turn be properly divided into two portions, viz: (I) The Federal, in which the powers of government are divided between the local or State governments and the General Government (and the greater portion of the Constitution applies to the Government in this Federal capacity); (II) the local, or that government in Territories or places in which no State government exists.

As a Territorial government Congress has all the powers which it possesses as a Federal Government, and together therewith all the powers which the State governments possess, save such powers as may be expressly inhibited to both governments by the Constitution and reserved to the people.

Nat. Bank v. *Yankton* (101 U. S., 129).

But a curious sophism has recently been advanced. It is contended that land may be within the sovereign jurisdiction of the United States, the Government may exercise unlimited jurisdiction over it, and yet that such land or territory is not territory of the United States. It is difficult to combat this assertion, because it is a mere assertion, resting upon no logical basis whatever.

> "All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States."
>
> *Nat. Bank* v. *Yankton*, *supra*.

The Territories are nothing more than outlying dominion of the United States.

The learned court below in the Goetze case says:

> "New territory is not brought under the Constitution by acquisition of the soil, otherwise *Fleming* v. *Page* could not have been decided as it was. This is done either by an incorporation of the inhabitants into the Union, or by an extension of our laws and institutions throughout the territory. This can not be done by conquest, but only by legislation *or treaty*. (*Fleming* v. *Page*.) Here the treaty recognizes and makes complete the *de facto* title

gained by conquest. The island is not thus brought under the Constitution *unless the treaty supplements the confirmation of title by an incorporation of the inhabitants into the Union* under the Constitution or by the extension of our institutions." * * *

That the incorporation of the inhabitants into THE POLITICAL BODY constituting the sovereign people of the United States has nothing to do with the immunities of persons within the territory seems thus abundantly established.

V.

THE QUESTION OF THE STATUS OF PORTO RICO UNDER THE PRESIDENTIAL GOVERNMENT CAN NOT AFFECT THIS CASE.

Again it has been urged that the imposition of duties here complained of is made valid by reason of the President's prerogatives over conquered territory held under military sway.

But the tax having been imposed at New York upon goods of a New York merchant under the general tariff law, it is immaterial that Porto Rico may have been under a military form of government.

The Executive claimed that war existed, and the military status continued, and we believe the courts can not view the matter in any other light, but must follow the coordinate branch of the Government.

Assuming, however, the truth of this, it does not follow therefrom that territory ceded to the United States is not a part thereof. The fact that the Executive still continues a *de facto* government originated under the law of belligerent rights does not affect the question. It has never been judicially determined, however, that when war has notoriously ceased and peace reigns triumphant the Executive in such a *de facto* government can still exercise full war rights without the restraints and restrictions imposed upon government by the Constitution.

The Government and the courts have established a contrary doctrine in the case of California (*Cross* v. *Harrison* and *Leitendorfer* v. *Webb*, *supra*), where it was held that the presidential government originated in belligerent rights and remained the *de facto* government until Congress chose to legislate otherwise.

It is respectfully submitted that while war actually continues the executive power is there as Commander in Chief, and that when war has ceased, and it is so recognized by the Executive, the Executive remains as the government in a civil capacity for the purpose of executing the laws of the United States.

International law, or that great body of usage prevailing among nations, is, of course, only a part of our law and binding upon our Government, as far as it has been recognized, acted upon, and adopted by our tribunals. But even viewed from this precise standpoint, our courts have recognized and adopted the rule of international law, that when territory is ceded the law of the old government remains in force. The sanction, of course, is in the acquiring government, and the old laws are laws because sanctioned by the new sovereign of the ceded territory. As the laws of the former sovereign, they are without force; as the usages of the inhabitants sanctioned by the new sovereign, they obtain the dignity of law, and this law remains

unchanged until Congress chooses to act. *And as the laws of such new sovereign they can not prevail if they are in conflict with the fundamental principles of the new sovereign's constitution.*

> "Every nation acquiring territory by treaty or otherwise must hold it subject to the constitution and laws of its own government."
> *Pollard's Lessee* v. *Hagan* (3 How., 212–225).
>
> "Every nation which acquires territory by treaty or conquest holds it according to its own institutions and laws."
> *Fleming* v. *Page* (9 How., 615).
>
> "By this substitution of the new supremacy, although the former political relations of the inhabitants were dissolved, their private relations, their rights vested under the Government of their former allegiance or those arising from contract or usage remained in full force and unchanged, except in so far as they were in their nature and character found to be in conflict with the Constitution and laws of the United States."
> *Leitendorfer* v. *Webb* (20 How., 177).

It is therefore clear that such law is only good when not in contravention of the Constitution or laws of the United States, which might possibly apply to new territories.

In enforcing such law the Executive is merely enforcing the law of the United States, and, we respectfully submit, is acting in a civil capacity.

In such capacity he has not the rights which he would have as Commander in Chief during hostilities, and, therefore, the immunities of the Constitution for the protection of life, liberty, and property operate in favor of the individual in the ceded territory; that is to say, they operate as restraints upon the Government there because it has ceased to be military and become civil.

This theory was the one adopted by the court in *Cross* v. *Harrison*, and was tersely summed up as follows:

> "*This Government de facto will, of course, exercise no power inconsistent with the powers of the Constitution of the United States, which is the supreme law of the land.*"

We submit, however, that the determination of this question is not necessary to the decision of this case.

The duties were levied upon a merchant at the port of New York, a place within the southern district of New York, a portion of the territory constituting the United States under the civil government of a State.

The form of government in territory belonging to the United States may be military or civil, *but the territory is for that reason none the less a part of the United States and, therefore, according to the Constitution, duties must be uniform throughout.*

To claim that because a part of the United States may temporarily be under military government goods coming therefrom must be taxed as goods coming from foreign countries seems to us the result of great confusion of thought.

Judge Taney's illustration in *Fleming* v. *Page*, to the effect that ports remained foreign to the revenue laws until these laws had erected the machinery of custom-houses, collection districts, inspectors, and collectors, was clearly not necessary to the decision, and as a dictum

was in itself incorrect as the historical precedents invoked were mistakenly stated and has been ignored by this court in the later case of *Cross* v. *Harrison* (16 How.).

Duties must be uniform throughout the United States, and it is a matter of indifference under what particular form of government any portion of the United States be.

Were the State of New York declared to be under the military government of the United States, we respectfully submit that during the time of such military occupation goods coming from New York into New Jersey or into the District of Columbia belonging to merchants there could not be taxed on the theory that New York was not a part of the United States.

VI.

THE MEANING OF THE UNITED STATES.

This brings us to a consideration of the Government plea that in the uniformity clause the term "United States" does not mean what it plainly implies.

It may be admitted, as Judge Townsend says, that other nations may take territory under their sovereignty, which they do not annex and make part of themselves.

That the people of the United States could do this and could declare that the inhabitants of territory annexed in future should have no rights recognized by the Constitution is clearly demonstrated.

That the present officials of the United States can do this we deny.

The analogy to other countries is misleading. The Constitution of the United States is a peculiar one. In the European states the government is also the state or nation. The same power which legislates also makes the constitution. Many of the European nations have a so-called constitution, but that instrument is not a constitution strictly, but merely a *charte Constitutionelle* or charter, an instrument by which *the government* gives *to the people* certain rights. The government possessing all the rights of the sovereign nation and being itself sovereign can, when acting in territory not covered by this *charte*, govern as it wishes.

This is the absolute reverse of the United States. In the United States the *people* endow the *Government*. And the people of the United States, in addition to other inhibitions which they have placed upon their Government, have declared that duties must be uniform throughout the United States.

References, therefore, to the constitutional history of other nations can have no bearing whatever.

The one question, and the sole question, for decision is, whether Porto Rico, within the meaning of this clause, is a part of the United States.

While in one sense this is a political fact, it is also a fact affecting a property right protected by the Constitution, and as such a fact the court will, of course, feel bound to decide it.

The advocates of the position taken by the collector must claim broadly and without reservation, in order to maintain their contention, that the clause of the Constitution requiring uniformity of duties throughout the United States refers only to the thirteen original States and the States to be formed in the future, "because the term United

States as there used (in the uniformity clause) means only territory comprised within the several States of the Union." (Brief of Attorney-General in Goetze case, p. 5.)

The claim in substance is that the term United States as used in the Constitution can have only two meanings: (1) The collective name of the States which were united together under the Constitution and mentioned in the Declaration of Independence and in the Articles of Confederation; this is the original and literal meaning of the word. (2) The corporate name of the nation.

That as used in the United States Constitution the term United States frequently refers to the States united does not admit of question. It is, however, admitted that it is used with great frequency in another sense as the political entity exercising governmental power.

In the Pinckney Draft of the Constitution, evidently with a view to make clear one of the meanings of the term "United States" as used in the Constitution, appears the following:

> "The United States shall be forever considered as one body corporate in law, and entitled to all the rights and privileges which to bodies corporate do, or ought to, appertain."

That it has, however, a *third* meaning, is also evident. It means not only the States united and the body corporate or governmental power which represents them, but it means—and this is its ordinary meaning in the language of the day—that whole portion of the earth's surface over which the flag of the United States flies in sovereign dominion.

It is clear, therefore, that we are not restricted to the meaning of the term as it appears in the Articles of Confederation. It is argued with more emphasis than plausibility, that because it meant in that instrument the States united, it can mean nothing more in the Constitution of the United States, and that the phrase "United States" in the tax clause of the Constitution is equivalent to "The United States in Congress assembled."

We submit that this is a misinterpretation of history.

During the confederate period the thirteen States were thirteen distinct political sovereignties united together by a compact which was strictly an agreement in the nature of a treaty. They were not a nation.

The creation of the Constitution, however, wrought a fundamental change; a pouring of new wine into old bottles. Some of the form remained, but the spirit was gone.

A people practically homogeneous in law and language had chosen to organize itself into a political governmental unity; an idea which had existed only in the consciousness of the people had become by the organization of the Constitution an objective reality.

A nation did not spring into being as the poets have it, because the nation existed. But the nation established for itself a government and by the Constitution gave it the necessary organization. This change was so radical that it is absurd to say that the term "United States" as used in the Constitution was used in the same sense as it had been used in the old Confederation.

The United States, indeed, sometimes might mean the States of the United States. But it meant something more besides.

Since the treaty with England of September 3rd, 1783, a vast tract of unorganized land had come into the possession of the people inhabit-

ing the thirteen States, formerly the British colonies of North America. Whether this tract of land belonged to the individual States or to the people was long a mooted question, and the dispute arising therefrom was the main cause leading to the formation of a more perfect union and the adoption of the Constitution. But, from the time that this vast tract of territory came within the sovereign dominion and jurisdiction of the United States, that term ceased to mean only the States united.

As was said by Madison in the Federalist (No. 38):

> "We may conclude that the Northwest Territory will soon become a national tract, and Congress having assumed the government of this Territory, has attempted to do more. They have appointed officers and have prescribed the conditions upon which States may be admitted into the Union. *All this has been done and done without the least color of constitutional authority.*"

It was clear that the Government of the Confederation had never had any constitutional right to govern this Territory. The people of the United States, even under that imperfect organization, took upon themselves the task which resulted in the celebrated ordinance of 1787, by which the inhabitants of this Territory were accorded not only the ordinary civil rights, which in that primitive age were considered so important as to be inalienable, but also certain political rights.

Of course until the cession of these lands to the General Government by the people of the United States, the latter term could have but one meaning. It would have been perfectly possible, and even proper, for the people to have used another word to designate the entire domain made up of the original States and the new land, and which John Marshall called the American Empire.

But the draughtsman of the Constitution chose to use the same word to designate three things: The States, the corporate name of the nation, and the whole territory over which the people of the United States through either their General or State governments had jurisdiction.

It is admitted by an able advocate of the view under criticism that, as far as the United States has been concerned,

> "At all events no such new term has been adopted and hence United States is the only term which we have had to designate either individually or collectively the States and Territories, and accordingly, while it has always been used for the former of these purposes, it has sometimes been used for the latter."—(Professor Langdell, Harvard Law Review, Feb., 1900.

Or, as the learned Attorney-General says, the word has the third meaning in "an international sense designating the extent of our dominion as a sovereign nation," and explains the admission by stating that the term in this sense is one of common usage—that is to say, conventional, and that it has no constitutional or legal meaning, and that, therefore, the Constitution can not be supposed to have intended it for that purpose.

So far from its being probable that the framers did not mean to use the word in its so-called international sense, the history of that time demonstrates quite conclusively that the exact opposite was their intention.

The great ordinance for the government of the Northwest Territory, drawn originally by Jefferson, and somewhat modified before it passed

through Congress, was in some respects a prototype of the Constitution itself. It embodied the ideas which led up to the foundation of the Constitution, based upon the political philosophy adhered to by most of the framers of the Constitution. It gave to the hardy and self-reliant pioneers in that Territory political rights of self-government and secured to them the guarantees of personal freedom in accordance with the most enlightened rules of the common law. That this ordinance was regarded as sacred and as unchangeable as the law of the Medes and Persians, appears from its language, which declares it to be a compact between the people of the Territories and the people of the States, unchangeable except by consent. Almost the first act of the first Congress, in which many of the framers of the Constitution sat, was to reenact the Northwest ordinance in its entirety. It is idle to say that their doing this involved the notion that the people therein were not sufficiently protected by the Constitution, as the learned Attorney-General assumes. The Constitution gave them no right of local self-government. It was necessary to enact some law conferring upon them political rights, and therefore the ordinance was reenacted by Congress, the original ordinance having been adopted prior to the adoption of the Constitution.

The fact that the ordinance contained many of the provisions of the subsequent Constitution in no manner supports the theory of the learned Attorney-General that "the accepted doctrine was that such guarantees and rights must be conferred by Congress" (p. 102 of Goetze brief).

Unnecessary provisions are sometimes inserted in statutes out of abundant caution. (*McAllister* v. *U. S.*, 141 U. S., 187.)

VII.

THE UNIFORMITY CLAUSE IS NOT IN THE NATURE OF A LAW ITSELF, BUT PROHIBITS THE CONGRESS FROM PASSING CERTAIN LAWS.

In further considering the reach of this uniformity clause or the consequent breadth to be assigned to the term "United States," it is proper to recall the difference between the rule of interpretation to be given to a statute, and that to be given to an organic act whose object was to restrict the statute-making power, and prohibit the enactment of a certain class of obnoxious legislation.

As the ordinance was framed before the Constitution it seems strange to claim that "the history of the ordinance for the government of the Northwest Territory also proves that the statesmen of that day did not accept the doctrine that the guarantees enjoyed by the inhabitants of the States were possessed by the inhabitants of the Northwest Territory neither by virtue of the Articles of Confederation nor the fact that they had theretofore been within the jurisdiction of one of the States." (Atty. Gen., Goetze brief, p. 102.)

The provisions of the Constitution relating to the States have often been put in the statutes creating the machinery necessary to carry them out. Without this machinery many of these enactments are lifeless.

This is true of the original judiciary act drawn by Mr. Ellsworth and of many of the early statutes.

The prohibitions in the Constitution against direct taxation, unless

in proportion to representation, uniformity in duties, and the bill of rights, are, however, all of a negative nature.

They forbid the Government to do certain things and it does not require legislation to carry out the prohibition. In other words, the Government can not legislate in contravention of them.

The Constitution intended that all the inhabitants of the States and Territories under the sovereign dominion of the United States should have the equal protection of the laws and the Constitution.

As was said by Judge Bradley in *Boyd* v. *The United States*, 116 U. S., 616, regarding the fourth amendment:

> "As every American statesman during our revolutionary and formative period as a nation was familiar with this monument of English freedom (referring to Lord Camden's decision in *Entic* v. *Carrington* and three other king's messengers, which was the Wilkes case) and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the fourth amendment to the Constitution," etc.

It was therefore true, historically and legally,

> "That the District of Columbia or the territory west of the Missouri is not less within the United States than Maryland or Pennsylvania; and it is not less necessary on the principles of our Constitution that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other. Since then the power to lay and collect taxes, which includes direct taxation, is obviously coextensive with the power to lay and collect duties, imposts, and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States." (*Loughborough* v. *Blake*.)

Admitting that the Constitution uses the term "United States" in several senses, it would then follow that we must seek for the meaning of the term in the context.

It is not reasonable to suppose, however, that different senses would be given to the word in the same clause. "That Congress shall have power to lay and collect taxes * * * to provide for the common and general welfare of the United States," etc., but all duties must be uniform throughout the "United States."

The United States for whose debts and general welfare the proceeds of the taxes are to be devoted must mean the same United States throughout which they are to be uniform.

It is respectfully submitted that it can hardly be seriously contended that Congress can not apply the proceeds of the general taxation to the general defense and welfare of the Territories as parts of the United States.

If our opponents are logical they must deny this and Congrees would, therefore, not have the power to apply the proceeds of general taxation to the welfare of the people of Oklahoma or New Mexico, or to defend them in case of invasion.

The Constitution also provides that Congress shall have power to pass a uniform rule of naturalization. It has been recognized by the Supreme Court that the early laws passed by the Congress in which

sat many of the members of the convention are contemporaneous interpretations of the highest value.

An examination of the naturalization law will show that that statute was intended to include the Territories as well as the States.

The act of 1795 (1 U. S. Statutes at Large), which was an act to provide a uniform rule of naturalization, includes the Territories of the United States within the term United States. It declares that any alien may become a citizen of the United States upon complying with certain requisites.

He shall declare before one of the courts that he has resided in one of the States aforesaid or *within the Territory within which such court* is held at least one year. His time of residence within the Territory is evidently included within the five years within which he shall reside within the United States, and it is evident that the statute uses the term United States in the same sense that Chief Justice Marshall used it as the Great American Empire. That it also used it in the sense of States United is evident from the first article, "That any alien being a free white person may be admitted to become a citizen of the United States or any of them." Certainly in the naturalization law the word was used in both senses.

Elk v. *Wilkins* (112 U. S., 102) virtually takes the same view.

It is unsound to argue that because in some contexts the word is used meaning individual States it may not in others mean to apply to all the dominions over which the Government exercises jurisdiction.

The flexibility with which the word "State" may be used, and the underlying principle that when used in some legal enactment or document the context must be considered and the word may be understood in its conventional and ordinary meaning as well as in the legal or historical meaning, is well illustrated in the case of *Geoffrey* v. *Riggs* (133 U. S., 258).

It is there held that the word "States" or "Union" may include the District of Columbia, although strictly speaking the District of Columbia is not a State. It is a political entity possessing the right to local self-government and may properly fall within the designation of State as understood generally in the language of diplomacy and international law.

> "To insure reciprocity in the meaning of the treaty it would be necessary to hold that by the term United States or Union is meant all the political States in the country. * * * It is not only those political communities called the States, but also those which constitute the political bodies called the Territories and the District of Columbia."
>
> (*Geoffrey* v. *Riggs*, *supra*.)

The question of the meaning of this term arises very clearly under the fourteenth amendment in the phrase, "All persons born or naturalized in the United States." This phrase has been interpreted by the Supreme Court in the famous case of *Wong Kim Ark* v. *The United States* (169 U. S., 167), as follows:

> "These provisions are useful in their application to all persons within the Territorial jurisdiction. It is accordingly enacted by section 1997 of the statutes that all persons within the jurisdiction of the United States *shall have the same rights in every State or Territory.*"

As was said in the Slaughter House cases (16 Wallace, 74):

"Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside *within the State* to make him a citizen of it, but it is only necessary that he should be born or naturalized *in the United States* to be a citizen of the Union."

Which is the "*United States*" as here distinguished from the several "States?"

It has been demonstrated—

That the term United States was meant by the framers of the Constitution to include States and Territories or the outlying dominion under the jurisdiction of the United States;

That the Constitution itself shows that it was used in this sense in the uniformity taxation clause;

That the early laws of the United States carrying out the Constitution so interpreted it and that the meaning given to it by Chief Justice Marshall as the equivalent of the Great American Empire was the meaning intended by the fourteenth amendment.

This meaning is the ordinary general meaning in which it is understood, not only by American citizens, but by people throughout the world. The historical, legal, and constitutional uses of the term are therefore in accord.

The fact that it sometimes means the States of the United States and at other times the Government is immaterial, as each time that it occurs in the Constitution its meaning must be determined by the context.

It is true that an eminent statesman, Mr. Webster, at times contended, both before the Supreme Court and in Congress, that the Constitution did not apply to the Government of the United States when it was acting in the Territories, and that it had there no limitation.

"Congress," he says, "has full legislative powers in the Territories "without any grants from the State. What is Florida? It is no part of the United States."

In the great debate with Calhoun, however, Mr. Webster admitted that the laws of Congress governing Territories were based upon the power granted in the Constitution to make all necessary rules and regulations for the Territories of the United States, thereby admitting that a portion of the Constitution, at least, applied to the Territories. He was also forced to admit that the constitutional inhibitions on the General Government were everywhere in force. (20 Cong. Globe, 252—Feb., 1849.)

An examination of the position taken by Mr. Webster shows that he had in mind political rights, and that when he asked about Florida and said it was no part of the United States because not represented in Congress, he had in mind the political rights of the people of the States recognized by the Constitution, which extends as well to the inhabitants of Territories.

The position, however, which he was forced to take resolves itself simply into the assumption that under the rules and regulations clause Congress can do what it wishes in the Territories. This position has been so frequently overruled by the courts that it is scarcely necessary now to argue it.

It is certainly inapplicable to the uniformity clause, because even if the

Bill of Rights by any strained construction of the Constitution be held not to go with Congress into the Territories, certainly the uniformity clause, as has been shown, applies to the whole United States, and therefore limits Congress when legislating for the Territories.

The learned counsel for the Government has set forth the debate in the Senate on the Walker amendment proposing the extension of the Constitution to California. He considers Calhoun the father of the theory that the Constitution can have effect in the Territories, and believes the doctrine to have had its origin in the desire of the advocates of slavery to carry that institution into the Territories.

If Webster adopted a position which even his ability and ingenuity failed to sustain, this position is fairly attributable to his fear that the doctrine that the Constitution extended to the States would involve the proposition (not as we believe a necessary consequence) that slavery should also be allowed to exist in the Territories free from the power of Congress to interfere with it.

He was, therefore, looking at the question from a partisan standpoint, and his opinion on the question as a legal proposition was as much influenced thereby as that of Calhoun.

The debate referred to has been well described by Von Holst, a historian whose hostility to slavery and its advocates is a most marked characteristic of his able and exhaustive work.

He says:

> "The amendment in this modified form gave rise to an interesting and important constitutional debate. Webster objected to it on the ground that it gave the President unlimited authority over the district, but he also maintained that it was impossible to extend the Constitution in so general a way to a Territory. It was indeed the moral duty of Congress in its legislation for the Territory to preserve the principles of the Constitution, but it was not absolutely necessary. The Territories were not a part, but a possession of the United States.
>
> "Calhoun, on the contrary, maintained that the Constitution, which was of itself the supreme law of the land, extended *proprio vigore* and *eo ipso* also to the Territories, even though its provisions were not all applicable there. If the Constitution extends to the Territories, whence did Congress get the authority, which existed only by virtue of the Constitution, to exercise any government over the Territories?
>
> "Calhoun was evidently right, although Webster had good grounds for astonishment that the radical upholder of State rights should support this view. The courts of the United States have decided that the Constitution has a legal existence. The relation of the Union to the Territories is, therefore, a legal relation in and under the Constitution which is wholly independent of the legislation of Congress, of which it is in fact the basis. The fact that the legislative action of Congress is required in order to make this legal relation effective is by no means, as Webster seemed to think, in contradiction of this relation, for, as Calhoun rightly said, the legislative action of Congress is equally necessary in order to put into operation the provision of the Constitution relating to the States. Unquestionably there is an essential difference between the nature of the legal relations of the States to the Union and that of the Territory. The distinction following Webster's

line of thought is closely followed by Cooley's saying, 'the Constitution is made for States, not for Territories.' * * *

* * * * * * *

"And equally incontestable is its (the Supreme Court's) further declaration that the powers of the Federal Government in regard to the persons and property in Territories can not be greater than those guaranteed to the citizens of the State. Calhoun had asked whether Congress could create a nobility and an established church in the Territories."

Von Holst's Constitutional History, vol. 3, p. 444.

Exemption from the uniformity clause has been sought in the fact that Congress, acting as the local legislature, may impose special taxes for the use of a special locality, as the States may do in the territory over which they have legislative power.

When Congress is acting as the local legislature in the Territories, and taxing there, it is contended that it is not bound by the uniformity clause.

Such taxes are not for the common welfare of the United States, but are to defray the expense of the government of the locality, and in the dual position which Congress occupies in our system, as Federal government and as local government for the territory of the United States not erected into States, it has the power to tax for local purposes.

Taxes, therefore, levied in Porto Rico, the proceeds of which are applied for the benefit or maintenance of the government of the island, may, perhaps, be defended upon the ground that they are imposed in the exercise of the right which Congress has in the Territories.

But no question of this kind can arise in this case. The tax was imposed under the Dingley Act, a law for the taxation of all goods coming into the United States of America and for the benefit of the Treasury of the United States. Congress in passing this law was acting as the General Government, and no question of its power as the local legislature can possibly be raised. The tax was levied on the goods of a New York merchant at the port of New York and is unaffected by the status of Porto Rico, it being once admitted that Porto Rico was a part of the United States.

VIII.

Precedents Drawn from Our History do not Sustain the Position of the Government.

The precedents attempted to be drawn by the learned counsel for the Government from the history of the Louisiana and Mexican annexations under the treaties with France and Mexico, respectively, are not in point.

The learned Attorney-General states (page 31 of his Goetze brief):

"It is a common error, long disseminated and many times repeated, to assert that Jefferson was under the belief that the United States had no constitutional power to acquire foreign territory. * * *

"An examination, however, of his writings and of his whole course of action with reference to the Louisiana purchase, especially with reference to the constitutional question, shows conclusively that Mr. Jefferson's doubt was not with reference to the power

of the United States to acquire foreign territory, but rather as to the right to annex it to and make it a part of the United States."

The learned counsel thinks this point of very great importance. As a matter of history his view is perhaps correct, although even as to this there is considerable doubt.

What Jefferson did certainly doubt, and the history of the time and the debates in Congress admirably set forth in the brief for the Government tend to show it, was the power of Congress to admit new States to the Union from the ceded territory without even a constitutional amendment or the consent of all the States.

Mr. Jefferson had instructed Mr. Livingston, then American minister in Paris, that in no event should a provision be inserted in the treaty with the French Government providing that States should be erected in the new territory, as he evidently did not believe that this could be legally done, and was therefore unwilling that the Government should take upon itself an obligation which it could not carry out.

Mr. Jefferson knew the jealousy which the States felt of each other and the sectional feeling which prevailed. He felt that an attempt to form States out of this vast territory would give rise to controversy, and with this in view he so instructed Mr. Livingston. Mr. Livingston, however, for reasons which doubtless justified the wisdom of his act, disobeyed the instructions of Mr. Jefferson.

The First Consul desired to insert a provision in the Louisiana treaty to the effect "that the inhabitants be incorporated into the Union of the United States," etc. It was necessary to conclude the treaty with great rapidity, as France was verging upon a war with England, and the opportunity presented by the proposition of the First Consul to cede the whole Louisiana territory seemed so favorable to Mr. Livingston that he thought no obstacles should be interposed to its immediate execution. It was for this reason that the clause was inserted in the treaty, contrary to the express instructions of the President. This clause, as appears from its wording, can mean only one thing. The new territory was to be admitted among the States of the Union, and its inhabitants to be citizens of such States as soon as possible.

The history of the time, as outlined in the foregoing, proves this beyond question (Adams' History of United States, Vol. II, Chap. II to V).

As was said by Mr. Jefferson and quoted by the Attorney-General: "It is most necessary [to convene Congress] because they will be obliged to ask from the people an amendment of the Constitution authorizing their receiving the province INTO THE UNION" (p. 35).

> "The Constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union."
>
> "I think it would be safer not to permit the enlargement of the Union but by amendment of the Constitution."
>
> "I am aware of the force of the observations you make on the power given by the Constitution to Congress to admit new States into the Union without restraining the subject *to the territory then constituting the United States.* But when I consider that the limits of the United States are precisely fixed by the Treaty of 1783, that the Constitution expressly declares itself to be made for the United States, I cannot help believing that the intention was to

permit Congress to admit into the Union new States which should be formed out of the territory for which and under whose authority alone they were then acting. I do not believe it was meant that they might receive England, Ireland, Holland, etc., into it, which would be the case under your construction" (pp. 33 to 36, Attorney-General's brief).

The learned Attorney-General, however, seems to assume that the expression of the treaty that the territory shall be admitted into the Union, etc., means something different from the union of the States. He says:

> "This correspondence demonstrates conclusively that whatever doubt Jefferson had as to the constitutional authority for the Louisiana Treaty related, not to acquiring territory, but to the right either of the treaty-making power or of Congress to annex it to or incorporate it into the Union."

If by this the Attorney-General means to incorporate it into the Union *as a State*, we agree with his assertion. We can not see what other meaning it can possibly have, and yet the Attorney-General finds in this history of the Louisiana acquisition precedent for the proposition that territory may be acquired and held by our Government as a colony or province not a part of the United States.

The meaning which the learned Attorney-General seems to have in mind is that the Union included not only the actual States, but that portion of the States which had been ceded to the General Government and which was usually known as the Northwest Territory. He seems to think, further, that as the framers had intended that that territory should be erected into States, it stood upon a different basis from territory thereafter acquired, and that incorporation into the Union did not necessarily mean as a State, but meant to place the new territory in the same position as that formerly held by the Northwest Territory.

We fail utterly to appreciate the force of this argument.

Even assuming it to be true that Jefferson and his advisers, as well as the framers of the Constitution, contemplated that this territory was held in trust for the purpose of erecting States out of it, nevertheless there was nothing in the Constitution to show that this territory should be held differently and governed differently from territory thereafter acquired.

Admitting, as it is claimed, that Jefferson did assume that the U. S. Government had the power of acquiring territory, it would then, according to the contention of the learned counsel for the Government, come under the rules and regulations clause.

This is the clause, however, of the Constitution in which he finds warrant for the government of the Northwest Territory.

Therefore, the Northwest Territory and the new acquisitions must have stood on a precisely similar footing. As is said by the learned Attorney-General (page 102 of his brief):

> "The history of the ordinance for the government of the Northwest Territory also proves that the statesmen of that period *did not accept the doctrine that the guarantees enjoyed by the inhabitants of the States were possessed by the inhabitants of the Northwest Territory*, neither by virtue of the Article of Confederation nor by the fact that they had theretofore been within the jurisdiction of one of the States."

The phrase "union" therefore meant the union of States, and when Mr. Jefferson and his advisors doubted the propriety of admitting the territory into the Union, they did not mean the union of States and Territories, but the union of the States. Besides, it is respectfully submitted that that is the undoubted meaning of the word union.

The debates cited at so much length clearly show that the only question was as to the constitutionality and propriety of the stipulation of the treaty admitting the new territory into the Union.

Many in Congress shared Mr. Jefferson's doubts, at least as far as the question of admitting the new territory to Statehood was concerned.

It did not seem to be clearly understood at that time whether the treaty was of itself operative so to admit the inhabitants, or whether an act of Congress was necessary, or whether both together without an amendment of the Constitution or the consent of all the States could accomplish the object.

That Art. III of the Treaty of 1803 was considered by Congress and by the Louisiana inhabitants as intending to provide for an admission of their territory as a State is evidenced by the remonstrance and the Congressional reply, which we excerpt:

> "Your honorable body seems to have adopted a construction of this article which would suspend its performance until some period fixed by the principles of the Constitution and to have read the article thus: 'The inhabitants shall be incorporated into the Union and admitted to the enjoyment of all the rights, etc., as soon as the principles of the Federal Constitution will permit.' We, on the contrary, contend that the words 'according to the principles of the Federal Constitution,' as they are placed in the sentence form no limitation, that they were intended as a description of the kind of rights we were to enjoy, or, at most, relate to the mode in which they were to be conferred, and that the article contemplates no other delay to our reception than will be required to pass the necessary laws and ascertain the representation to which we are entitled."

To this remonstrance the Committee of Congress replied:

> "We consider, in the first place, that the clause, which is the ground of our claim, is a stipulation made expressly in favor of the inhabitants of Louisiana then existing, because the French Government had no right to stipulate the incorporation of the *future* citizens of Louisiana. We think that the words 'as soon as possible, according to the principles of the Constitution,' evidently express that this incorporation is to be executed without any unnecessary delay, and that it is to take place on the same *principles* by which the Constitution has regulated the rights of the individual States, and of the citizens of the United States, in relation to the Federal compact. We humbly think that any interpretation tending to procrastinate the incorporation of the *present* inhabitants of Louisiana into the Union is directly opposite to the spirit of the third article of cession of our country, the object of which is unquestionably to secure that advantage to the inhabitants who are annexed to the United States by that treaty; that, consequently, any condition depending on future circumstances ought to be inadmissible, because it would expose the

inhabitants who existed in Louisiana when the treaty was made to be kept out of the enjoyment of rights which have been stipulated for them."

The only difference of opinion was as to the time when such statehood should be conferred.

These doubts and difficulties were evidently borne in mind by the Government when it concluded the treaty with Mexico, and they were avoided, as appears from the clause of that treaty.

Mexico Treaty.	Louisiana Treaty.
Should be incorporated into the Union and be admitted at the proper time (not immediately *proprio vigore* of the treaty), but by act of the Congress of the United States to the enjoyment of all rights of citizens of the United States (p. 66—Attorney-General's brief in Goetze case).	The inhabitants of the ceded territory shall be incorporated into the Union of the United States and admitted as soon as possible according to the principles of the Federal Constitution to the enjoyment of all rights, advantages, and immunities of citizens of the United States.

Our apology for having gone at any length into these questions must be found in the stress placed upon them by our learned opponent. We respectfully submit, however, that even conceding his contention that Jefferson believed the Government could annex territory, though he doubted whether such territory could be admitted into the Union, the question in this case is not affected.

The contention of the Government is, that this territory and all territories, save the original States and the States subsequently admitted, are not affected by the inhibitions placed by the Constitution on the action of the Government.

This they claim to be true of all territory owned by the United States from the earliest time to the present; that is, their argument applies equally to the Northwest Territory and to the island of Porto Rico.

There is here failure to distinguish between political rights on the one hand and the immunities against the actions of the Government which the people of the United States have created by the Constitution on the other hand.

The statesmen of Jefferson's day were, many of them, unwilling that Louisiana should be admitted into the Union, have two Senators and Representatives in Congress, and disturb what they believed to be a very nice adjustment of interests. What they doubtless feared was political power. They had no desire to oppress Louisiana, establish an order of nobility or a religion, to take property without due process of law, or to tax the inhabitants for their own benefit. That none of these things were in their minds was evident from the course pursued. She was given all the guarantees of liberty and the machinery to carry them out. Our customs laws and tariff were extended to her and her inhabitants were not cut off from our markets. No debates, no struggles, no doubts can be found in the history of the time as to the right of her people to have all these things. It is, therefore, manifest that the statesmen who opposed the treaty opposed it, not because they feared to grant those things which were given so freely and so unani-

mously, but because they feared the subsequent admission of States from Louisiana and the injection of new political forces and interests into the Union of the United States. The act of March 26, 1804, for the government of Louisiana enacted a full bill of rights in entire accord with the Constitution.

It is true that (in October, 1803), the House hurriedly enacted a bill providing for immediate temporary government, by the President, transferring to him all the powers held by the former Spanish officials. That this was a temporary measure appears upon its face and the bill above referred to for the government of the territory was passed within a year, yet even in this haste the safeguard was inserted that these powers should be exercised for maintaining and protecting the inhabitants of Louisiana in the full enjoyment of their liberty, property, and religion.

While this latter bill was under consideration, Dr. Eustace, of Massachusetts, made a speech largely relied upon by the learned Attorney-General in support of his point that the Constitution had no effect in Louisiana.

Dr. Eustace said:

> "The people, in my opinion, are at present unprepared for and undesirous of exercising the elective franchise. The first object of the Government is to hold the country. How? By protecting the people in all their rights and by administering the government in such a manner as to prevent any disagreement among them—to use no other term. * * * When they should be better acquainted with the principles of our Government, and shall have become desirous of participating in our privileges, it will be full time to extend to them the elective franchise. Have not the House been informed from an authentic source since the cession that the provisions of our institutions are inapplicable to them?"

And yet this speech was made in support of a bill which guaranteed full civil rights.

The view was then held by Congress, and probably rightly held, that the people should remain under what we term territorial government for some time before they should be admitted as States.

In this connection the learned Attorney-General seems to believe that Gouverneur Morris' statement as to what he intended by the rules and regulations clause of the Constitution should have some weight. While we scarcely believe that a communication contained in a private letter as to what one member of a convention desired that the law should mean, can be considered as a factor by this tribunal, nevertheless we respectfully submit that if the letter is to be given any weight at all it goes to show that the convention took a view opposite from that advocated by the Government.

Gouverneur Morris says:

> "I always thought that when we should acquire Canada and Louisiana, it would be proper to govern them as provinces and allow them no voice in our councils. In wording the third section of the fourth article, I went as far as circumstances would permit to establish the exclusion. *Candor obliges me to add my belief, that had it been more pointedly expressed, a strong opposition would have been made.*"

Mr. Morris' idea seems to have been that newly acquired territory should not, under the Constitution, be admitted to statehood. If he meant that it should be denied the ordinary common-law rites guaranteed by the Constitution, he did not say so. However, even assuming, as the Government seems to do, that this was his intention, he apparently shrank from announcing it to the convention. He, as a member of that convention, and a prominent participant in its debates, doubtless understood the views of all those present, and so sure was he that no scheme of colonial government, such as he apparently had in mind, could be engrafted upon the Constitution, that he endeavored by means of a subterfuge to inject into the Constitution something which might be twisted into granting a power which the other members of the convention did not wish to confer upon the Government.

The rules and regulations clause, viewed in the light of history, referred to granting titles to land in the Northwest Territory and otherwise disposing of and regulating it. It was a substitute for the Pinckney draft "to appropriate the unappropriated lands of the United States."

Gouverneur Morris' redraft of this clause was passed without opposition, and it was evident that the framers of the Constitution saw no other meaning in it than that in the Pinckney draft. That so able a man as Morris should have been compelled to attempt to confer upon the Government by the Constitution such a power in such a way is very clear evidence of the intentions of the majority who framed the Constitution. As he himself admits, had his intention been expressed, a strong opposition would have been made. That this opposition would have been strong enough to override his views would seem not improbable from his fear and failure openly to express them.

THE TERRITORIAL COURTS.

The cases relating to the Territorial courts have been so fully discussed in the briefs already presented to the learned court, that further comment is not required. We may only say that they do not affect the question as to whether territory newly acquired by treaty, and as yet unorganized, is within the limits of the United States and subject to the uniformity clause of the Constitution.

The regular judicial courts of the United States were clearly established by the Constitution for the purpose of exercising jurisdiction in reference to certain specified matters and within the States of the United States. The language of the Constitution makes this clear in itself. They were adapted to carry out the Federal system of government.

They are, this court has said, "parts of the Federal system, invested with the judicial power of the United States, expressly conferred by the Constitution and to be exercised in correlation with the presence and jurisdiction of the several State courts and governments."

Hornbuckle v. *Toombs*, 18 Wall., 648, 655.
Cited with approval ir *McAllister* v. *U. S.*, 141 U. S., 180, 183.

On the other hand, the courts established by the Congress within the Territories have jurisdiction not only over matters which the Constitution specially reserves to the Government as a Federal Government, but general jurisdiction over all cases arising between man and man, and which in the States are within the jurisdiction of the State courts.

In other words, they are not Federal courts, but municipal courts. The most, then, that these cases decide is that the Territorial courts are not the courts mentioned in the Constitution. The ultimate ground upon which these decisions do and must rest, is the fact that the Territories are not States, and therefore the constitutional courts would be inapplicable to them.

> "The distinctions between the Federal and State jurisdictions, under the Constitution of the United States, has no foundation in these Territorial governments, and consequently no such distinction exists either in respect to the jurisdiction of their courts or the subjects submitted to their cognizance. They are legislative governments, and their courts legislative courts. Congress in the exercise of its powers in the organization and government of the Territories combining the powers of both the State and Federal authorities. There is but one system of government or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to State and Federal jurisdiction." *Benner* v. *Porter*, 9 How., 235.

This question is entirely different from the question at bar. The inhibitions placed upon the central government are general in their language and are applicable to the Government and not to any particular territory or any particular circumstances. That Chief Justice Marshall so understood it is very clear from the expressions used by him in the Canter case. He admitted that by the treaty at least the citizens of Florida were citizens of the United States. If that was so, it is very clear that Mr. Webster's contention that Florida was not part of the United States was considered unsound. But having held Florida to be a part of the United States, the court then proceeds to show Territorial courts to be local courts under the act of Congress, and not courts of the United States. It is little less than absurd to say that Chief Justice Marshall, though considering citizens of Florida to be citizens of the United States, considered Florida to be a foreign country.

THE INDIAN PRECEDENTS.

Some concern has been expressed with reference to the effect of the nationalization of the uncivilized tribes that may inhabit the invaluable possessions acquired under the Treaty of Paris—a dread of the suffrage wielded by hordes of untamed Malays.

The Attorney-General has, we believe, dissipated this fear by the position which he assumes for the Government at page 60 of the Goetze brief:

> "The political status of the native Indian tribes within territory acquired by the United States by treaty has been uniformly regarded as unaffected by the cession. A long line of special treaties with such tribes and numerous acts of legislation by Congress on the subject of Indians and Indian rights show that these people have always been regarded as *quasi*-foreign."

This position is sustained by precedent at once abundant and illustrious, from the Cherokee Nation, 5 Pet., 17 (1826), down to the most recent date, through the *Cherokee Tobacco; U. S.* v. *Kagama; Crow Dog; Taltan* v. *Mayer* (163 U. S., 376); *Elk* v. *Wilkins*, &c.

The Indians have from the beginning been considered and held as distinct political communities, owing a primary allegiance to their tribal authorities, and not subject to the complete jurisdiction of the U. S.

For this reason their birth within the United States does not confer upon them the citizenship which the Constitution attaches to such birth in one subject to the jurisdiction.

While the Indians, however, have occupied under the law the anomalous position of independent though subservient nationality, the territory they occupy has never ceased to be territory of the United States, within the geographical boundaries of and subject to the sovereignty and dominion of the nation; in every sense a part of the United States, to the extent that birth within such territory was enough to endow the person so born with citizenship—unless he owed immediate allegiance to some tribe.

The only question that remains is: Whether uncivilized tribes in our new Asiatic or Caribbean possessions may be assimilated to these Indian tribes, if the Government or Congress should choose so to treat them.

That the existence of tribal relations and the savage state should have a like effect in either case goes without saying, unless there is some constitutional inhibition; unless, in other words, the relation of Indian tribes, which has prevailed since the Constitution was adopted, can be shown to have been limited by such Constitution to North American Indians.

We submit with confidence that no such limitation can be found.

This court in *U. S.* v. *Kagama* (118 U. S., 374) says:

"The Constitution of the United States is almost silent in regard to the relations of the Government which was established by it to the numerous tribes of Indians within its borders" (p. 378).

The court then proceeds to point out that the only clauses relevant are the power to regulate commerce with the Indian tribes, and the apportionment of direct taxation excluding Indians not taxed.

It was the ownership of the territory, and the right of exclusive sovereignty over the same, which was lodged in the Federal Government that gave that Government the right of controlling the actions of the Indians, excluding from any such privilege even the State government within whose borders an Indian reservation was located.

In *Elk* v. *Wilkins*, the relation of the Indian born within the United States and subject to tribal government was determined not under any specific Indian clause in the Constitution, but by the clause relating to citizenship by birth, and under the XIVth amendment.

In other words, there are virtually no Indian clauses in the Constitution, certainly nothing to confine the regulation of our intercourse with uncivilized tribes within our borders to North American Indians.

In the acquisition of Mexican territory, additional uncivilized tribes were brought in and dealt with.

On the acquisition of Alaska, the uncivilized tribes in that Territory, whose racial characteristics are as distinct from the North American Indian as both are from the Malay and the Tagal, were dealt with on the same basis. The treaty provides:

"The inhabitants * * * with the exception of uncivilized native tribes shall be admitted to the enjoyment of all the rights,

advantages, and immunities of citizenship, &c." (Art. III, Mar. 30, 1867.)

"The uncivilized tribes will be subject to such laws and regulations as the United States from time to time adopt in regard to aboriginal tribes."

On the acquisition of the Philippines, the general commanding entered into a treaty with the head of the Sulu tribes, who there enjoys the title and certain attributes of a sultan.

We can see no difficulty, as indeed we see little relevancy, in the relation of the Indian question to the sovereignty of the United States over all territory within its borders, and the obligation which the Constitution establishes of uniform imposts throughout those borders.

IX.

The Effects of Cession upon the Question of Citizenship.

It is contended by the Government that:

"The conceded power to acquire territory by treaty or by conquest includes the right to prescribe what terms the United States will agree to as fixing the status of its inhabitants."

(Brief Atty. Gen. in Goetze case, p. 58.)

We have elsewhere shown that the status of the inhabitants is a matter apart from and outside the principles governing this case.

The question of customs duties has nothing to do with citizenship or nationality.

The brief of the learned Attorney-General expresses our views admirably.

"The right to bring merchandise into the United States is a right entirely within the regulation of Congress; such a right in no wise differs as to either citizens or aliens. Citizenship carries with it no special or peculiar privileges at the custom-house. The American, the Spaniard, the Porto Rican are treated alike. The basis of the customs laws is not ownership, but (1) the geographical origin of the shipment, and (2) the nature of the goods."

(Brief Atty. Gen. in Goetze case, p. 6.)

Under these circumstances, and with this concession, it might seem superfluous to discuss the vexed question of citizenship had not the learned Attorney-General deemed it important, if not relevant, and discussed the question at some length in his brief.

In support of his proposition he cites two precedents:

(1) The status of the free negro prior to the civil war, and the amendments to the Constitution.

(2) The history of our relations with the Indians.

It may be a cause for surprise that he should have adduced in support of such an important proposition the two least creditable instances in our history.

His argument seems to sum itself up as follows:

The inhabitants of Porto Rico are not citizens of the United States because (1) the power to confer citizenship is one which the Government has not in this instance chosen to exercise; (2) such citizenship is not expressly conferred either by the Constitution, the laws, or the treaty; this appears from the fact (as shown by the Dred Scott case)

that free negroes were not citizens and that the members of the Indian tribes have always been held to be not citizens but *quasi* foreigners who could only acquire citizenship by naturalization.

These questions seem so important as to require somewhat full examination.

> "The law knows nations only as political communities and as sovereign States. The nationality, therefore, as a legal attribute of persons, is connection with a certain body politic, membership in a particular State. The members of a State are called its subjects or citizens. The former term if properly construed is applicable to the people of any nation without regard to the form of government, for every State is based upon the relation of its members to its sovereign."
>
> (Encyclopædia Political Science and United States History, article Nationality, by Munroe Smith.)

The question of citizenship in the United States has always been confused because of the use of that word in a dual sense. The word citizen has two meanings.

It means in the first sense, primarily and properly, the persons exercising political rights and members of the ruling body politic.

In the second sense, it is applicable to the whole people of any nation without regard to the form of government. Citizenship in the latter sense means simply subject to the allegiance of a particular State or nation. In this sense it has precisely the same meaning as the term "subject." (Story on the Constitution, Cooley's Edition and Notes, §§ 1932–33–34, cited at length by Sen. Foraker, p. 12, Rep. No. 249—5th Feb., 1900—56th Cong., 1st sess.)

All the members of a nation, subject to its jurisdiction, or, as the common law has it, "born under the actual obedience" are subjects or citizens in this sense. The word subject has been somewhat discredited by reason of its usual reference to feudal or absolute monarchies where none or few of the subjects are citizens in the sense of possessing political rights. The learned Attorney-General is in error in supposing that "the term does not imply anything as to the nature or form of the government of which one is a subject" (p. 72 Goetze brief.) By reason of the disfavor that this term has thus fallen into, it is now found in no constitutionally governed nation save England.

The rule of the common law upon this subject is plain and well settled both in England and America. Except in the case of children of ambassadors, who are in theory born upon the soil of the sovereign whom the parent represents, a child born in the allegiance of the king is born his subject without reference to the political *status* or condition of its parents. Birth and allegiance go together. (1 Blackstone, 366; 2 Kent's Com., 39, 43; *Ingles* v. *The Sailor's Snug Harbor*, 3 Pet., 120; *U. S.* v. *Rhodes*, 1 Abb. U. S. Rep., 40; *Lynch* v. *Clarke*, and authorities there cited; 1 Sandf. Ch., 630.)

This is nothing more than declaratory of the rule of the common law as above stated. To be a citizen of the United States by reason of his birth, a person must not only be born within its territorial limits, but he must also be born subject to its jurisdiction—that is, in its power and obedience.

McKay v. *Campbell* (3 U. S. Courts Rep., Ninth Circuit, 118, p. 129).

See also *Elk* v. *Wilkins* (112 U. S., 99).

In order, however, to avoid the ambiguity due to this dual sense, the Germans and the French make use of the word "nationals" to denote all persons subject to the allegiance of the state, *i. e.*, forming a part of the nationality, including both holders and nonholders of political rights. Generally speaking, therefore, nationals and aliens would include every person within a given territory and would indicate the legal relations which they hold to the public authority of such territory.

Nationals are again divided into two classes, those possessing political rights and those who do not possess them. The latter class would include women, minors, and persons who, for a variety of reasons other than alienage, do not possess the political franchise. (*Minor* v. *Happersett*, 21 Wall, 162).

The fourteenth amendment, declaring that all persons born or naturalized in the United States and subject to their allegiance are citizens, uses the word in the sense of national or subject.

Before the fourteenth amendment the only apparent exception was due to the peculiar incidents of our history which made the negro something different from the ordinary human being—half man, half beast—something partly within the domain of natural history and partly within that of politics.

> "The citizenship of the negro had been denied in the Dred Scott case on the assumption that citizenship and subjection were not identical ideas; that a person might be a subject without being a citizen.
>
> "In declaring that citizenship is acquired in the same manner in which subjection is established at common law, the fourteenth amendment has placed the equivalency of these terms and established the citizenship of a negro beyond the possibility of a doubt." (Encyclopædia Pol. Sc., Article Nationality.)

In the recent leading case on the question of nationality and citizenship—Wong Kim Ark, 169 U. S.—JUSTICE GRAY, writing for the court, says: "In *Dred Scott* v. *Sanford* (1857), 19 How., 393, Mr. Justice Curtis said:

> "'The first section of the second article of the Constitution uses the language—a natural-born citizen. It thus assumes that citizenship may be acquired by birth. Undoubtedly this language of the Constitution was used in reference to that principle of public law well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth. (19 How., 576.)
>
> "'Allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; and allegiance by birth is that which arises from being born within the dominions and under the protection of a particular sovereign. Two things usually concur to create citizenship; first, birth locally within the dominions of the sovereign; and secondly, birth within the protection and obedience, or in other words, within the ligeance of the sovereign—that is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from and consequently owe obedience or allegiance to the sovereign as such *de facto* * * *.

"'Subject and citizen are in a degree convertible terms as applied to natives; and though the term citizen seems to be appropriate to republican freemen, yet we are equally with the inhabitants of all other countries subjects, or we are equally bound by allegiance and subjection to the Government and law of the land.' (2 Kent. Com., 258, Note.)

"Passing by questions once earnestly controverted, but finally put at rest by the fourteenth amendment of the Constitution, it is beyond doubt that, before the enactment of the civil rights act of 1866, or the adoption of the constitutional amendment, all white persons at least and born within the sovereignty of the United States, whether children of citizens or of foreigners, excepting only children of ambassadors or public ministers of a foreign government, were native-born citizens of the United States.

"The fundamental principle of the common law with regard to English NATIONALITY was birth within the allegiance, also called 'ligealty,' 'obedience,' 'faith,' or 'power,' of the King. The principle embraced all persons born within the King's allegiance and subject to his protection. Such allegiance and protection were mutual—as expressed in the maxim, *protectio trahit subjectionem, et subjectio protectionem*—and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the Kingdom. Children born in England of such aliens were, therefore, natural-born subjects. But the children born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the King's dominions, were not natural-born subjects, because not born within the allegiance, obedience, or the power, or, as would be said at this day, within the jurisdiction of the King."

Proceeding from these unquestioned principles, it naturally follows that the natives of Porto Rico and the other ceded islands are United States nationals, or, as the learned Attorney-General prefers to term them, American subjects.

They are subjects or nationals in the same sense that women, minors, inhabitants of Oklahoma and Arizona are subjects or nationals.

Persons in States requiring an educational qualification for voting, who cannot attain to this qualification, are also in this position.

And, certainly, if the learned counsel means no more than this, he is right when he says that, "To be called an American subject is no disgrace."

That the treaty carries out this idea is very clear, for it declares that natives of the peninsula of Spain who have not elected to remain Spanish subjects shall be deemed to possess the *nationality* of the territory in which they reside. Of course, the nationality of the territories depends upon the nation under whose jurisdiction the territories are, and as this jurisdiction is the United States, the phrase is equivalent to saying that citizens of the territory who do not elect to remain Spanish citizens become American nationals, or, again, as the learned Atorney-General prefers to style them, American subjects.

It is very clear that Porto Rico and the island of Guam have no nationality of their own, nor can any territory which does not possess sovereignty or autonomy be said to have any nationality. The inhab-

itants of these possessions of the United States are subject to its obedience and are, therefore, its nationals or subjects.

The negotiators of the treaty with Spain undoubtedly understood the treaty—as making all the inhabitants who did not elect to remain Spaniards, American citizens or nationals.

The Spanish commissioners claimed that—

> "The American commission refuses to acknowledge the right of the inhabitants of the countries ceded or relinquished by Spain to choose the citizenship with which, up to the present, they have been clothed. And, nevertheless, this right of choosing, which is one of the most sacred rights of human beings, has been constantly sacred since the day when man was emancipated from serfdom. This sacred right has been respected in treaties of territorial cession concluded in modern times."
>
> Annex to Protocol No. 21, treaty of peace between United States and Spain of Dec. 10, 1898.

To this the following reply was made:

> "The American commissioners do not so understand the article upon the subject of citizenship submitted by them as a substitute for the article proposed by the Spanish commissioners. An analysis of the article will show that *Spanish subjects, natives of Spain,* are allowed a year's time in which, by the simple process of stating in a court of record their intention so to do, they may preserve their allegiance to Spain.
>
> "Such persons have the fullest right to dispose of their property and remove from the territory, or, remaining, to continue to be Spanish subjects or elect the nationality of the new territory.
>
> "As to natives, their status and civil rights are left to Congress, which will enact laws to govern the ceded territory. This is no more than the assertion of the right of the governing power to control these important relations to the new government. *The Congress of a country which never has enacted laws to oppress or abridge the rights of residents within its domain, and whose laws permit the largest liberty consistent with the preservation of order and the protection of property, may safely be trusted not to depart from its well-settled practice in dealing with the inhabitants of these islands.*"
>
> Annex 1 to Protocol No. 22, treaty of peace between United States and Spain of Dec. 10, 1898.

In view of these assertions of the treaty makers, is it reasonable to claim that this treaty was intended to empower Congress for the first time in its history to govern "dependencies" without regard to Constitutional immunities?

But the learned counsel for the Government, if we understand him correctly, claims that annexation of territory by mere treaty cession which makes no provision for conferring citizenship upon the inhabitants leaves them aliens until Congress chooses to enact otherwise.

The Louisiana, Florida, Mexican, and Alaskan treaties provided that the inhabitants shall be admitted to the enjoyment of the rights and privileges of citizens of the United States, and from this he infers that without such stipulation they would not have been citizens.

As to Louisiana, Florida, and Alaska, the stipulation evidently refers

to the full citizenship incident to statehood; not to "naked citizenship," to borrow Justice Curtis' phrase, or, as we have termed it, "nationals."

The Alaskan treaty is peculiar in that it excepts uncivilized tribes.

"The inhabitants of the ceded territories, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they prefer remaining in the ceded territory they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States." (Alaska Treaty, Art. III.)

In that treaty remaining three years was considered equivalent to renouncing the Russian allegiance.

The Attorney-General considers this privilege of election a suspension of citizenship by the United States, and finds in this proof that the Constitution did not affect the question. (Brief, p. 58.) It is respectfully submitted that the inhabitants of Alaska had been Russian citizens or subjects; that it is usual under the general postulates of international law to allow persons to retain the allegiance to their former masters, if they so desire. The provision in the Alaskan treaty simply gave the inhabitants three years to decide whether they would retain their former allegiance. Their citizenship was not suspended; they were Russian citizens until they chose to become American citizens.

This treaty is analogous to the treaty with Spain. The Spanish-born inhabitants of the ceded islands are allowed one year in which to decide whether they wish *to retain their former citizenship*. In case they should retain it, their allegiance was due to Spain and their reliance for protection was upon her. Should they not retain it, they then became United States nationals. (Treaty of Paris, Art. IX.)

The other inhabitants of the islands have not been accorded this privilege for reasons fully set out in the documents of the Peace Commission. (Senate Doc. 64, 1898.)

As far as the United States was concerned, the latter people could not remain like natives of the peninsula, Spanish subjects, but became at once United States nationals. That the United States might have given them power to remain Spanish subjects is doubtless true, but it did not choose to do so.

Pothier thus lays down the principle, says Mr. Lawrence, in reference to the acquisitions which had been made by France before the French Revolution:

> "When a province is united to the Crown, its inhabitants must be regarded as *Frenchmen* whether they were born before or after the union."

Pothier carries the principle so far as to say:

> "There is every reason to think that the *foreigners* who are established in these provinces, and who have there obtained, according to the laws in force, *the rights of citizenship, must, after the annexation, be considered citizens* equally with the native inhabitants of those provinces, or, at least, with foreigners naturalized in France."

And applying the same principle in the cases of loss and restoration of territory, he says:

> "When a province is dismembered from the Crown, when a conquered country is restored by the treaty of peace, the sover-

eignty over the inhabitants is changed. Citizens at the time of the conquest or since the conquest, or if born since the union, citizens by their birth till the dismemberment of the province, become foreigners." Traité des Personnes, Part I, tit. 2, sec. 1, cited by Lawrence, Appendix to Wheaton, 897.

The treaty of April 26, 1798, for the incorporation of the Republic of Geneva with the French Republic, declared that the Genevese who inhabited the city and territory of Geneva, as well as those who were in France or elsewhere, became and were *native-born Frenchmen* (français nés), and the treaty for the annexation of Mulhausen also declared that the citizens and inhabitants of Mulhausen and its dependencies became and were *native-born citizens* (français nés). Referring to these treaties, Mr. Lawrence says:

> "It is not, however, understood that these special declarations varied the conditions of the inhabitants of these small republics *from that of the numerous countries and provinces which were incorporated with France between 1789 and 1814.*
>
> "These relations established as to Geneva and Mulhausen *were applicable to all the annexations.*
>
> "They were the '*immediate consequences*,' says Foelix (Revue de Droit Français et Etranger, Tom. II, page 328, Naturalization Collective), '*of every union of territory, according to the existing law of nations, and since it is no longer* the custom, even after the conquest of a country, to reduce its inhabitants to a condition inferior to that of the conquering country.'"

This custom which, as Foelix says, has fallen into honorable disuse, is apparently what the Attorney-General desires to revive by placing Porto Ricans on the footing of the "1,135 free people of color in New Orleans in 1803," that is, at the time of its cession to the United States. (P. 59 of his brief.)

The dismemberment of populated territory from a State on the one hand, and its incorporation into a new nationality on the other, operate as a collective naturalization *ipso facto.*

> "Annexation of territory, either by peaceful cession or as a result of war, invariably carries with it a change of nationality. This is what is called collective naturalization." Pradier Fœdéré, Droit International Public, ed. 1885, Vol. III, page 721.
>
> "Treaties of annexation generally give an option to individuals owing allegiance to the State whose territory is annexed. This option may be manifested either by emigration simply, or by a declaration of intention accompanied by emigration; sometimes a simple declaration is made without resorting to emigration. In any case inaction or silence imports adhesion to the new order of things—*tacit accceptance of the nationality newly imposed.*" (*Ibid.* 1, page 723.)
>
> "It is a doctrine of natural law that conquest or peaceful cession relieves the inhabitants from all bonds of allegiance towards the sovereign of the passing territory and enjoins fidelity on their part to the new régimé. In fact, the inhabitants having had the choice of leaving the country or continuing their residence therein, it is but just that their permanent sojourn in the annexed territory should be construed as a tacit declaration of their fidelity to the conqueror." Calvo, Droit International Theorique et Pratique, ed. 1896, Vol. IV, page 394.

Foelix, cited by Lawrence, *supra*, says that "change of nationality results either by mere operation of law or from the act of the individual." Of the former he says, "cession of territory furnishes another example."

"There can be little or no doubt," says Halleck, "that the inhabitants of Florida, as intimated by Chief Justice Marshall, were entitled *without* the treaty stipulation, to the 'privileges, rights, and immunities' of citizens in this more extended sense of the term; but their right to be incorporated in the Union, and participate in political power, was derived from the treaty and not a necessary consequence, under the law of nations, of the transfer of their country and allegiance." (Halleck's Int. Law, §13, p. 824.)

"A collective naturalization of all the inhabitants is effected when a country or province becomes incorporated in another country by conquest, cession, or free gift."

Phillimore, Vol. I, p. 449, ed. 1879.

The treaty thus confers upon the inhabitants the "nationality of the territory to which they belong."

As to Porto Rico, that nationality is of course the United States.

Boyd v. *Thayer* (143 U. S., 162).

Porto Rico is not a country in the political sense, and hence can have no independent nationality of its own.

International law knows no State or nation of Porto Rico. It is not a member of the family of nations. Its inhabitants can only be either aliens, *i. e.*, persons owing allegiance to a sovereignty other than the United States, or nationals, *i. e.*, (passive) citizens of the United States.

Congress may of course naturalize, by annexing territory, the inhabitants, and, as we have demonstrated, *mere cession and transfer of territory has this effect without special stipulation in the treaty.*

A treaty provision to that effect is therefore merely declaratory of the rule of international law. As was said by the present learned Chief Justice:

"Persons not thus subject to the jurisdiction of the United States at the time of birth can not become so afterward except by being naturalized either individually as by proceedings under the naturalization acts, *or collectively, as by the force of a treaty by which foreign territory is acquired.*" (Wong Kim Ark., 169 U. S.)

"A person born out of the jurisdiction of the United States can only become a citizen by being naturalized either by treaty, as in the case of the annexation of foreign territory, or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals as in the ordinary provisions of the naturalization acts." (Wong Kim Ark., 169 U. S., 702.)

As to persons born subsequent to the acquisition, the question is even clearer. The XIVth amendment has enacted a rule of law into the Constitution which overrules treaties and legislation.

Prior to such amendment had the Government desired to violate the common-law rule adopted by the United States, it could have declared

in a case like that of Porto Rico that all of the inhabitants should remain citizens of Spain. The territory would none the less have been a part of the United States, but its inhabitants would have been aliens and subjects to a foreign jurisdiction. Such an incongruous result would, in the absence of Constitutional restriction, have been possible. The inhabitants of such territory would then have owed temporary allegiance to the United States such as aliens within its jurisdiction now owe it; but because a part of the territory is populated by aliens that territory is none the less within the geographical boundaries of the United States. The question could only arise as to inhabitants born before the cession, but as this treaty has provided otherwise, the question is academic.

The fourteenth amendment enacting the common-law rule of citizenship into the dignity of constitutional provision, settles the status of persons born since the cession.

> "The fourteenth amendment of the Constitution, in the declaration that 'all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside,' contemplates two sources of citizenship, and two only—birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States and needs no naturalization." (Wong Kim Ark., 169 U. S.)

The main precedent, however, upon which the learned Attorney-General seems to rely is that of the position of the free negroes before the civil war; because he says:

> "Suppose a cession of a small island with half a dozen inhabitants—must the United States agree to permit them to remain and accept them as citizens? It might be the purpose of the Government to use the island solely as a fort or military reservation * * * And if such restriction on its right to acquire exists, how does it resist the rights of uncivilized tribes in Alaska and in the Mississippi and New Mexican regions to be counted also as citizens? Or the 1,135 'free people of color' in New Orleans in 1803, to say nothing of the slaves."

The learned Attorney-General then proceeds to show from the Dred Scott decision that free negroes were not citizens. We may admit that the free negroes before the war and during the civil war occupied an anomalous position.

The case of Dred Scott simply held that the negro was so low in the scale of humanity that the States could not, by conferring freedom upon him, make him capable of becoming a citizen of the United States in the broad or passive sense. He was, therefore, neither citizen nor subject, but a being who, under the Constitution, was something different and apart from the rest of humanity.

His anomalous position was thus described by Chief Justice Taney:

> "In the opinion of the court the legislation and the histories of the times and the language used in the Declaration of Independence show that neither the class of persons who had been imported

as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

"It is difficult at this day to realize the state of public opinion in relation to that unfortunate race which prevailed in the civilized and enlightened portion of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

"They had for more than a century been regarded as beings of an inferior order and altogether unfit to associate with the white race either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might lawfully and justly be reduced to slavery for his benefit. He was bought and sold, as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

"And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and the English people. They not only seized them on the coast of Africa and sold them or held them in slavery for their own use, but they took them as ordinary articles of merchandise to every country where they could make a profit upon them and were far more extensively engaged in this commerce than any other nation in the world.

"The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence and afterwards formed the Constitution of the United States. The slaves were more or less numerous in the different colonies, as slave labor was found more or less profitable. But no one seems to have doubted the correctness of the prevailing opinion of the time" (pp. 407–408, 19 How.).

* * * * * * * *

"The question with which we are now dealing is, whether a person of the African race can be a citizen of the United States and become thereby entitled to a special privilege by virtue of his title to that character and which, under the Constitution, no one out a citizen can claim.

* * * * * * *

"The only two provisions which point to them and include them *treat them as property*, and make it the duty of the Government to protect it; no other power in relation to this race is to be found in the Constitution, and as it is a Government of special delegated powers, no authority beyond these two provisions can be constitutionally exercised."

Mr. Justice Curtis in his dissenting opinion uses the following apposite language (p. 583):

"And my opinion is that, under the Constitution of the United States, every free person born on the soil of a State, who is a citizen of that State by force of its constitution or laws, is also a citizen of the United States.

"I will proceed to state the grounds of that opinion.

"The first section of the second article of the Constitution uses the language 'a natural born citizen.' It thus assumes that citizenship may be acquired by birth. Undoubtedly this language of the Constitution was used in reference to that principle of public law well understood in this country at the time of the adoption of the Constitution which referred citizenship to the place of birth. At the Declaration of Independence and ever since the received general doctrine has been, in conformity with the common law, that free persons born within either of the colonies were subjects of the King; that by the Declaration of Independence and the consequent acquisition of sovereignty by the several States *all such persons ceased to be subjects and became citizens of the several States*, except so far as some of them were disfranchised by the legislative power of the States, or availed themselves seasonably of the right to adhere to the British Crown in the civil contest and thus to continue British subjects. (*McIlvaine* v. *Coxe's Lessee*, 4 Cranch, 209; *Inglas* v. *Sailors' Snug Harbor*, 3 Peters, p. 99; *Shanks* v. *Dupont*, ibid., p. 42.")

* * * * * * *

"A naturalized citizen can not be President of the United States, nor a Senator till after the lapse of nine years, nor a Representative until after the lapse of seven from his naturalization. Yet, as soon as he is naturalized, he is certainly a citizen of the United States. Nor is any inhabitant of the District of Columbia or of either of the Territories eligible to the office of Senator or Representative in Congress though they may be citizens of the United States. So in all the States numerous persons, though citizens, can not vote or can not hold office either on account of their age or sex, or the want of necessary legal qualifications. *The truth is, that citizenship under the Constitution of the United States is not dependent on the possession of any particular political or even of all civil rights; and any attempt so to define it must lead to error. To what citizens the elective franchise shall be confided is a question to be determined by each State, in accordance with its own views of the necessities or expediencies of its condition. What civil rights shall be enjoyed by its citizens, and whether all shall enjoy the same, or how they may be gained or lost, are to be determined in the same way.*"

* * * * * * *

"It rests with the States themselves so to frame their constitutions and laws as not to attach a particular privilege or immunity to mere naked citizenship."

It thus appears the condition of the negro was such that he was not in the legal sense a person. Whether free or slave, he was something capable of being reduced to property, and, therefore, he did not fall within any category which would fit the genus man.

But assuming that it is necessary to classify him at all, it may be said that he belongs to the class of "nationals," and further was placed in a subclass by himself (under the Constitution of the United States as interpreted by the court in the Dred Scott case), and that as member of that subclass he owed allegiance to the United States, but was incapable of possessing constitutional rights such as the right to sue in the Federal courts, which was expressly guaranteed to the citizens of the United States.

Thus political rights were accorded to some citizens and civil rights to all SAVE THE NEGRO.

It was for the purpose of removing from our Constitution this disability that the fourteenth amendment was enacted. By it the negro stepped from the domain of zoology into that of history.

What rights human beings owing direct and immediate obedience to the sovereign in whose jurisdiction they may reside are to possess is a question for that sovereign to determine in a constitution or by legislation, but subjection or nationality merely express a relation of fact, to wit, allegiance and protection.

The inhabitants of Porto Rico who were born subsequent to the cession and who do not owe any direct, immediate allegiance to any foreign nation are citizens or subjects of the United States.

As such citizens or subjects they possess whatever rights are generally conferred upon that class by law.

Neither by the laws of the United States nor the Constitution does any subdivision of that class exist incapable by nature of possessing any rights of any character.

This anomalous position was confined to the free negro before the fourteenth amendment.

If the learned Attorney-General dissents from this proposition, as to the inhabitants of the ceded territory, he can only do so upon the ground upon which Judge Taney held negroes not citizens, namely, that they were persons capable of being considered as property, and therefore too degraded to come within that category. If the learned counsel means anything else than this his argument is irrelevant.

If he means this, we can only say that his views have been repudiated by the American people in the civil war, by three amendments to the Constitution of the United States by this court, and by forty years of advancing civilization.

X.

THE QUESTION OF COLONIES.

It is erroneous to assume that the decision in this case can or will involve the right of the United States to own, possess, or govern colonies.

The only question involved is as to how the United States shall govern its colonies. From the beginning it has possessed colonies or dependencies.

Morris, in his work on colonization, Volume II, at page 292, speaking of Russia, says:

> "These recent efforts of Russia recall, if the digression be here permitted, that in this sense the United States have likewise, throughout their actual career, been engaged in the real work of colonization, although the extension of the Republic may not gen-

> erally be recognized as such a manifestation. The casual observer is prone to attach to this idea the idea of distance, to believe that for the application of the term colony to a dependency, the latter must necessarily be remote from the metropolis. The fact is, that the relation is based on certain peculiar mutuality of rights. What difference can it possibly make that the possession be isolated by the depths of the sea, by a voyage over the seas occupying a month, or by a journey on the land of a similar interval. If the thought of separation by water be disassociated, can not the settlement of Louisiana, California, and the Northwest Territory well be claimed as some of the greatest episodes of history? In Alaska the inhabitants are still occupied in the work of colonization."

That those territories have not usually been thought of as colonies, because they were not separated from the United States by large bodies of water, does not make them any less colonies. They are colonies just as much as Canada, New Zealand, or Australia are colonies of Great Britain. They had, however, been governed better and more liberally than the colonies of any power in the world, and the history of colonization shows that the methods of the Government of the United States are being imitated by the other nations of the world.

Therefore in acquiring and governing new territories, dependencies, or colonies, we have continuous precedents extending back to the formation of the Constitution, *but in governing these territories without according them as of right certain immunities which have always been deemed by the American people fundamental rights, we should be equally reversing* the precedents of one hundred years.

It is idle to say that Congress will give them these rights independent of the Constitution.

The question is not what Congress will do, but what it can do.

Congress has heretofore passed laws which were unwise, and has passed laws which have been declared by this court to be unconstitutional. There is no guaranty that they will not pass such laws again.

The government of Great Britain not many years ago passed a law (Ashburton Act) practically confiscating property in England and Ireland, and allowing the courts to fix the rents which the tenants should pay the landlords. Such an act would be utterly impossible under our system of government, as long as our present Constitution endures.

The learned Attorney-General in his brief, page 12, says:

> "No one pretends that Congress, irrespective of any limitation of the Constitution, could properly make and enforce a law to take without cause property of one person and vest it in another."

We ask why Congress can not do this.

If there is no legal limitation upon Congress, what limitation is there? If it be said a moral obligation, the answer is that it is no limitation whatever. Is there any reason to suppose that the Congress of the United States might not be willing to do as was done by the Parliament of England, which did the thing the Attorney-General claims that Congress could not do irrespective of the limitations of the Constitution, namely, to take property of one individual and vest it in another?

But the Attorney-General adds: "*These are all despotic powers which no Congress would claim, much less attempt to exercise.*"

History scarcely teaches the lesson that a body of men will not exer-

cise all the power which they possess. Rather the contrary is true, and the instances which we have in our own history in the attempt to make laws inconsistent with the Constitution would hardly lead us to assent to the proposition of the learned Attorney-General, that while Congress had the power to ignore these rights, it is certain that they would not do so. Colonies frequently, if not usually, suffer from too much government, rarely, if ever, from too little.

XI.

THE ARGUMENT FROM THE CONSEQUENCES.

We have now considered every one of the strictly legal arguments advanced in support of the Government's position. But arguments of another class have been presented, and a word must be said in reference to them.

It has been said that the due regard for constitutional limitations would make us a "crippled nation," and that, like "humpbacked Richard," we would be the laughing stock of nations as we "halt by them."

The argument from the consequences which may attend upon the interpretation of a constitutional provision is not always the best argument, but is one which may sometimes be considered. As was said by this court in *Maxwell* v. *Dow* (176 U. S., 590):

> "The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when, in fact, it radically changes the whole theory of the relations of the State and Federal Governments to each other and of both these governments to the people, the argument has a force that is irresistible in the absence of language which expresses such a purpose too clearly to admit of doubt. We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them."

We assert that the only consequence which the Government of the United States fears from an adverse decision is the necessity for free trade between the new possessions, or colonies, and the States of the United States.

It has been assumed that the guarantees of certain civil rights conferred by the Constitution might be incompatible with the government of newly acquired possessions. This assumption, however, is entirely negatived:

1. By the history of our past acquisitions, and

2. By the attitude already assumed by the Government in regard to our new territories.

In all our past acquisitions, not only those of the Northwest Territory, inhabited by English speaking people, but in territory acquired from Mexico, Spain, and France, inhabited by people different in

language, law, and religion, we have not feared, but, on the contrary, we have hastened to confer on the inhabitants all the rights and liberties which centuries of conflict led our ancestors to believe essential, if not sacred.

That these concessions have not retarded the development of our former colonies or territories is matter of public history.

The first act for the government of Louisiana conceded trial by jury and provided for the other guaranties of the bill of rights.

The military governments in the territories wrested from Mexico by conquest and confirmed by treaty gave the inhabitants these rights.

Not only have they been accorded to the civilized inhabitants of former acquisitions, but by recent legislation provision is made for the trial of Indians by the United States courts, and they are tried by the methods known to the common law and sanctioned by the amendments to the Constitution.

There is nothing in the Constitution incompatible with the proper administration of such territory. It is not probable that we will find it necessary to establish an order of nobility or to prohibit the free exercise of religion or of the right of the people peaceably to assemble.

We will scarcely find it useful to quarter soldiers in the houses of the inhabitants in time of peace or to establish torture in order to compel witnesses to tell the truth, or burning at the stake as a means of capital punishment.

And why, if we can try Indians by the ordinary methods of petit and grand jury, should we deny this right to the people of Porto Rico and the Philippines, who have been accustomed to Spanish criminal and civil law, which, whatever may be its deficiencies, is certainly preferable to the Indian tribal customs? Why should we desire to require excessive bail or prescribe cruel punishment?

The Government evidently desires to do none of these things. As the Secretary of War has said, they do not mean to interfere with what he terms:

> "The underlying principles of justice and freedom which we have declared into our Constitution, and which are the essential safeguards of every individual against the powers of government, not because these provisions were enacted for them, but because they are essential limitations inherent in the very existence of the American Government. To illustrate: *The people of Porto Rico have not the right to demand that duties should be uniform as between Porto Rico and the United States because the provision of the Constitution was not made for them.*"

We quote this to show exactly the effects which the Government fears from a decision that Porto Rico is within the United States; not the granting of common law rights to the people, but the opening of our markets to the colonial products.

In the Goetze case involving this question, "certain industries" have filed a brief in which they state that their interests are equally important with those of the Government of the United States. Those interests are commercial interests, whose desires, according to their brief, is that the American Government shall have the power to impose a tariff upon the products of these islands which would shut them out from competition.

It is therefore evident,

(1) From the nature of the rights guaranteed by the Constitution.

(2) From the views of our Government as outlined by the Secretary of War.

(3) From the attitude of the industrial interests here represented, and

(4) From the history of the Government of our former acquisitions, that the only effect of a decision by this court in favor of the Government would be to allow the shutting out of the products of these places from our markets, or, in other words, the taxation of the inhabitants of the new possessions for the benefit of some inhabitants of the States of the United States.

That any danger so great in its extent and dire in its nature would follow from the impossibility of imposing such commercial restrictions is hardly so evident or certain a factor as to influence the decision in this case.

But, even assuming that the people of the United State are unwilling to consume tobacco from Porto Rico and the Philippine Islands, or to allow it to be sold in their markets, they can prevent this by constitutional amendment.

The learned Attorney-General stated in his argument in the Goetze case that England taxed the products of her colonies at her custom-house. While the fact that the English Government follows a certain policy may not prove absolutely that such policy is a wise and beneficent one, yet we admit that the acts of the British Government, as the acts of a wise and prudent Government in matters of finance, are entitled to respect.

We would, however, call attention to the fact *that the English colonies also exclude English goods from their markets*, and as they possess a local self-government, with which the English Government interferes in no respect, can care for their own interests as well as the mother country, and, therefore, the case is scarcely analogous to that at bar.

There is probably no provision in the Constitution which demonstrates more conclusively the wisdom of the framers of that instrument than the uniformity clause.

It is argued that the insertion of this clause was due to the desire on the part of some States that a majority of the House of Representatives should not build up industries in some States to the loss of others, or, in other words, that the industries of the smaller States should not be at the mercy of the larger ones. While this reason may have been applicable to the States, it is inapplicable to the Territories according to the contention of the learned Attorney-General.

But we submit that it is more applicable to the Territories because, as they possess no representation, they are defenseless, and should the States impose burdens upon them by taxing their products they would thus have complete and absolute power to do so. Having no representation, the Territories could not defend themselves as might even a minority of the States from this form of oppression. It is true that taxation without representation is only a political right.

We have no right to assume that the framers of the Constitution, realizing this, were willing that their "posterity" should have no protection against this taxation. As the people of the Territories could not, under the Constitution, have representation, there was only one

principle that could protect them, and that was uniformity. It is good for the governed and the governing, the rulers and the ruled, to feel the pressure of the same law.

> "If it be said that the principle of uniformity established in the Constitution secures the district from oppression in the imposition of indirect taxes, it is not less true that the principle of apportionment, also established in the Constitution, secures the district from any oppressve exercise of the power to lay and collect any direct taxes." (5 Wheat., 324, C. J. Marshall in *Loughborough* v. *Blake*.)

Is it not possible that the framers of the Constitution may have foreseen the possibility that interested persons in the thirteen States might desire to build themselves up at the expense of or free from competition of the Northwest Territory? Certainly no provision more admirably adapted to prevent this could be framed than that requiring that all duties should be uniform throughout the United States.

We contend, therefore, that far from the effects which would follow from the adoption of our interpretation of this clause being incompatible with good government of the newly acquired Territories the direct opposite would be the result. They would have the inherent rights which the Government does not wish to deny them. They would possess, besides, freedom from that danger which English-speaking men have always held most important—unjust taxation. They can not be represented in fixing their taxes; their only safeguard, therefore, is that their rulers can not tax them without equally taxing themselves, and upon the best known principles of human nature it would be difficult to find an incident so calculated to guarantee the inhabitants of the newly acquired Territories from being unequally taxed in the disposition of their products and properties for the benefit of certain industrial interests.

XII.

CONCLUSION.

It is inevitable that upon questions of the breadth and far-reaching importance of those here presented all concerned in their settlement should look with anxiety on the result of their deliberations and seek to avoid in reaching a conclusion any disastrous effect upon the nation.

The Attorney-General has told us that the maintenance of the limitations invoked by the plaintiffs in error would make us a crippled nation, incapable of meeting the requirements which duty and destiny impose upon this Republic.

That we have a government of limited powers he has frankly conceded. We desire to impress upon him that the dangers of such limitation and their possible inadaptability to circumstances that might arise in a distant future was quite present to the master minds from whose contact sprang the instrument which has held together this mighty nation through nullification, secession, and civil war for more than a hundred years.

They provided for the emergency.

Article V of the Constitution prescribes a method for its amendment, which may be readily applied whenever the people agree with the contentions of the Government in the present case, and determine

that the limitations imposed upon their agents have ceased to be a benefit or have become an obstacle to the good government for which they sought.

We will not enlarge upon this theme, but will leave the case in the hands of the court with citations from two of its justices, and from one whom it is not yet considered sentimental to call the Father of his Country.

Mr. Chief Justice Fuller says:

"Differences have often occurred in this court—differences exist now—but there has never been a time in its history when there has been a difference of opinion as to its duty to announce its deliberate conclusions unaffected by considerations not pertaining to the case in hand."

Pollock v. *Farmers' Loan & Trust Co.* (U. S. Rep., 158, at pages 634–635).

"Still less can we recognize the doctrine that because the Constitution has been found in the march of time sufficiently comprehensive to be applicable to conditions not within the minds of its framers, and not arising in their time, it may therefore be wrenched from the subjects expressly embraced within it, and amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made."

McPherson v. *Blackie* (146 U. S., 36).

Mr. Justice Harlan says:

"If some of the guarantees of life, liberty, and property which at the time of the adoption of the national Constitution were regarded as fundamental and as absolutely essential to the enjoyment of freedom, have, in the judgment of some, ceased to be of practical value, it is for the people of the United States so to declare by the amendment of that instrument."

Maxwell v. *Dow* (176 U. S., p. 617).

Washington, in his farewell words to his fellow-countrymen, says:

"*If in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.*"

We confidently submit that no authority has been shown to justify the exaction of duties complained of by the plaintiff in error, and that the judgment of the court below should be set aside and the case remanded with instructions to give judgment for the plaintiff.

NEW YORK, 2 January, 1901.

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